

THE CONSTRUCTION OF STATUTES

Including

A GENERAL DISCUSSION OF CERTAIN FOUNDATIONAL SUBJECTS, SUCH AS THE NATURE AND SOURCE OF STATUTE LAW, THE SEPARATION OF POWERS, THE LEGISLATURE AND THE LEGISLATIVE PROCESS, THE INITIATIVE AND THE REFERENDUM, CONSTITUTIONAL REGULATIONS RELATIVE TO THE FORM AND THE ENACTMENT OF LEGISLATION, THE PLEADING AND PROOF OF STATUTES.

In Addition To

A DETAILED TREATMENT OF THE PRINCIPLES OF INTERPRETATION AND CONSTRUCTION.

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PREFACE

No one can better appreciate the formidable task of preparing a practical and comprehensive treatise on the construction and interpretation of statutes than he, who has examined, even though but casually, the myriad of reported cases, the numerous statutes, and the various secondary sources of the law which pertain to our subject. This treatise, however, represents the consummation of an effort to produce such a treatise—a treatise not too voluminous nor too abbreviated but confined within the narrowest limits deemed practicable and written without any attempt to be ultra-learned nor to startle or confuse by a new or unique method of treatment. In fact, the old and familiar orthodox method of treatment and classification has been substantially followed. More effort has been exerted to make the contents easily available than to treat the various problems and canons of construction abstractly. Indeed, it is not necessarily desirable, nor perhaps possible, to subdivide the law into separate and distinct subdivisions and to treat each abstractly, for the various principles and problems frequently interlock, depend upon, or grow out of each other.

It may not be essential in a treatise primarily concerned with the construction and interpretation of statutes to treat such matters as the nature and source of statute law, the division and delegation of powers, the legislature and its procedure, the initiative and the referendum. Nevertheless, a treatment of these and other related subjects, even though only in a summary manner, provides the background or foundation for a better understanding of the nature of the many problems arising in this important field of law and gives a better perspective for the proper application of the various principles of statutory construction and interpretation. And, in addition, the incorporation of a rather detailed discussion of these related subjects would seem to make the treatise more useful in that resort to other sources would not be necessary for a treatment of the basic law that pertains to one of such subjects. For these reasons, the subjects mentioned above and a number of others have been included herein, and those deemed of greatest importance discussed in varying degrees of thoroughness, depending chiefly upon the closeness of their relationship to our principal thesis.

In order to attain a greater degree of practicality, the general legal principles and the major exceptions thereto have been treated in the text, while, in most instances, the minor variations and excep-

liar holdings are usually placed in the foot-notes. Realizing that new statutes are constantly confronting the courts, particular emphasis has been placed on the reasons back of the various principles and conflicting views, in order that their application may be made easier and a choice intelligently made where conflict exists. The judicial process of interpretation has also been treated in considerable detail, since ascertaining the legislative intent should be of more concern to the court than the locating of a precedent or a case perhaps applicable through analogy or similarity of facts. Many cases are quoted from — some old and others relatively recent depending upon which best serves the intended purpose — in an attempt to illustrate or explain the matter under discussion, and often simply to make available an excellent statement of the rule or principle applicable.

Although this treatise has been written primarily for the practitioner, almost as much concern has been had to producing a work which would be of value to the legislator. To be prepared for effective service in the legislature, the legislator should know something not only about the separation and delegation of powers, the requirements pertaining to the titles of statutes, the restrictions on local and special legislation, and the procedure connected with the enactment of laws, but should also have some understanding of the principles which the courts apply in the construction of statutes. Such knowledge would tend to make more certain that the court will be able to ascertain the legislative intent, since the lawmakers would draft the law, knowing in advance what rules the court will apply and to what aids it will resort in its effort to ascertain the meaning of the statute and to make it effective. Besides, this knowledge, coupled with care in the drafting and enactment of legislation, will necessary tend to minimize ambiguities, make less frequent the need for judicial construction, in its technical sense, and save a considerable number of legislative acts from ultimate invalidity or ineffectiveness.

In conclusion, the author wishes to express his appreciation to his law partner, Mr. Samuel P. Harlan, of the Sedalia, Missouri, bar, for a number of valuable suggestions; to Mr. Frank R. Baker and André P. Hugues, both of Topeka, Kansas, for the assistance which they gave in assembling the manuscript.

EARL T. CRAWFORD.

Sedalia, Missouri,
January, 1940.

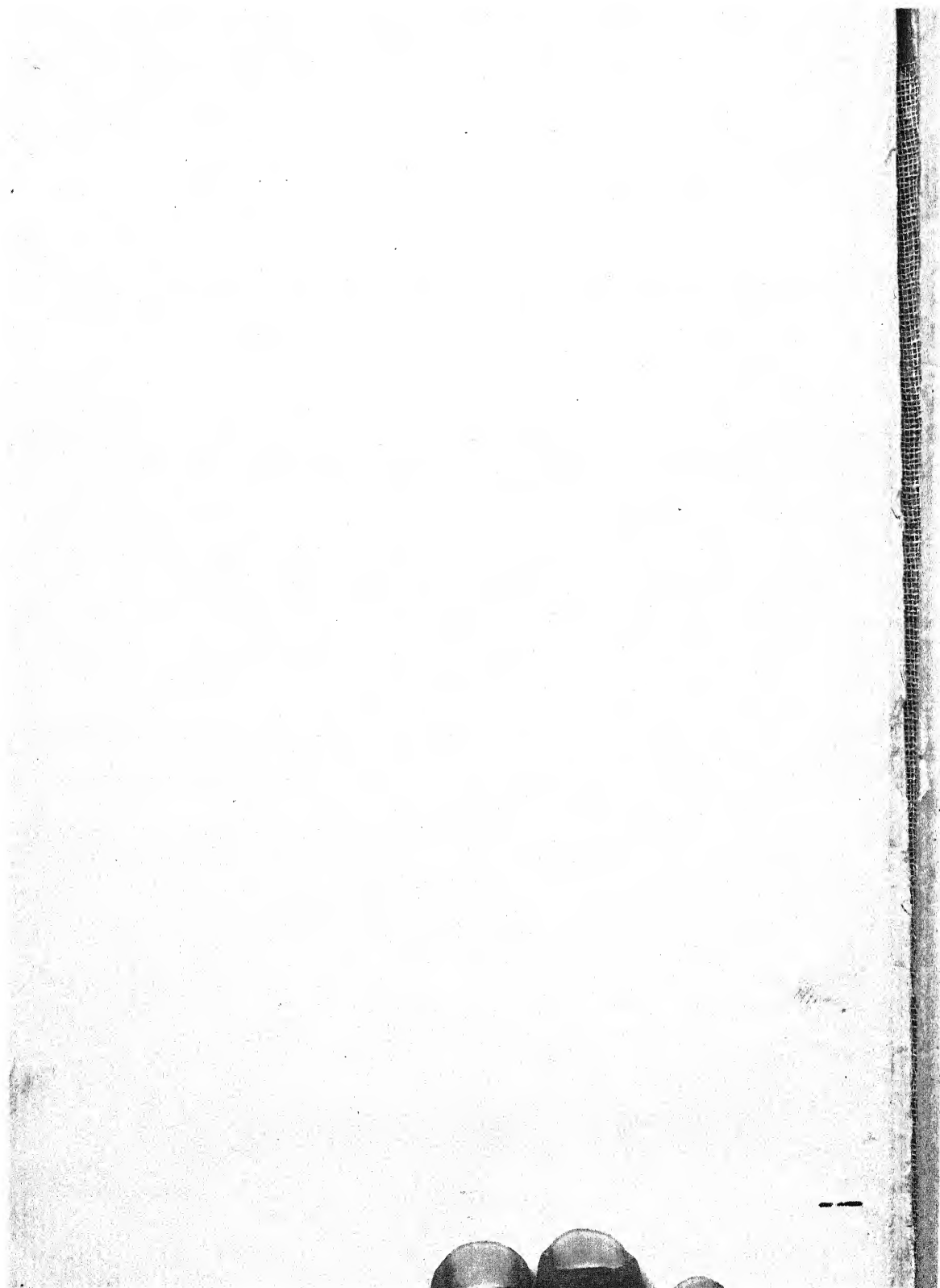


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CHAPTER I

THE NATURE AND SOURCE OF STATUTE LAW

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§ 1. **Statute Defined.**¹—Except perhaps for academic purposes, a definition of the word “statute” has little value in this treatise. In general, it may be defined as an act of the legislature as an organized body.² It is the written will of the legislature expressed according to the form necessary to constitute it a law of the state,³ and rendered authentic by certain prescribed forms and solemnities.⁴ It is an act of the legislature declaring, commanding, or prohibiting something.⁵ But the meaning of the word will naturally vary according to the connection in which it is used. For example, it may be used so as to include every act legislative in character to which the state gives its sanction, whether such act be a constitutional provision, a law, an ordinance, or an order.⁶ It is also frequently used to designate laws enacted directly by the people through the initiative.⁷ The word, however, so far as this

¹ Also see 1 Blackstone's Commentaries, 44, 1 Austin's Jurisprudence, § 2, Dwarrris, Statutes and Constitution, Chapt. 1, pp. 35-38, and Statutes, 59 Corpus Juris 521, § 1.

² State v Partlow, 91 N.C. 550, 49 Am.R. 652.

³ Lane v Missoula County, 6 Mont. 473, 13 Pac. 136. It is the expression of the public will. State v Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301.

⁴ Federal Trust Co. v East Hartford Fire Dist. (C.C.A.—2nd) 283 Fed. 95.

⁵ In re Van Tassel's Will, 196 N.Y. S. 491, 119 Misc. Rep. 478.

⁶ Williams v. Bruffy, 96 U.S. 176, 24 L.Ed. 716; New Orleans Waterworks Co. v Louisiana Sugar Ref. Co., 125 U.S. 18, 31 L.Ed. 607, 8 S.Ct. 741; John P. King Mfg. Co. v Augusta, 277 U.S. 100, 72 L.Ed. 801, 48 S.Ct. 489; Sultan R. Co. v. Washington Dept. of Labor, 277 U.S. 135, 72 L.Ed. 820, 48 S.Ct. 505.

⁷ Baird v Burke County, 53 N.D. 140, 205 N.W. 17. For further treatment see *infra* Chapter VI, § 47 et seq., The Initiative and Referendum.

treatise is concerned, will refer either to a law passed directly by the legislature or to one enacted by the people at the polls by the initiative.

§ 2. **Statute Law Defined.**—"Statute Law" is a term often used interchangeably with the word "statute".⁸ Technically, the former term is broader in its meaning; it not only includes "statute", as above defined,⁹ but also the judicial interpretation and application of the enactment.¹⁰ In other words, "statute law" may be defined as the will of the state expressed by the legislature¹¹ or by the people through the initiative¹² and expounded by the courts.

§ 3. **Statutes Compared**¹³—**Joint Resolutions—Ordinances, Etc.**—Not every legislative act, however, has the dignity or significance of a statute. Resolutions¹⁴ constitute one exception of major importance. A resolution may be defined as a formal expression of the opinion or will of a public assembly adopted by a vote;¹⁵ it is merely a suggestion, or a written direction, concurred in by the legislature and not submitted to the executive for his approval, and ordinarily passed without the forms, solemnities and delays generally required for the enactment of statutes.¹⁶ Resolutions of this nature, where passed by legislative bodies composed of two branches or houses, are usually referred to as joint resolutions. They, too, are often used in this country for administrative purposes of a local

⁸ *Rohrbacher v City of Jackson*, 51 Miss. 735.

⁹ See § 1, *supra*.

¹⁰ *St. Wilberforce*—L. 8.

¹¹ See § 1, note 3, *supra*.

¹² *State ex rel Evans v Stewart*, 53 Mont. 18, 161 Pac. 309; *State v Erickson*, 75 Mont. 18, 161 Pac. 309; *Baird v Burke County*, 53 N.D. 140, 205 N.W. 17.

¹³ For further comparison and discussion, see *Statutes*, 25 R.C.L., § 3.

¹⁴ *Johnson v Craft*, 205 Ala. 386, 87 So. 375; *Paxton v Bogardus*, 201 Ill. 628, 66 N.E. 853; *Moulton v Scully*, 111 Me. 428, 89 Atl. 944; *Cape Girardeau v Fougau*, 30 Mo. Ap. 551; *Comm. v Bitner*, 294 Pa. 549, 144 Atl. 733; *State v Summers*, 33 S.D. 40, 144 N.W. 730, L.R.A. (N.S.) 206; *San Antonia v Miklejohn*, 89 Tex. 79, 33 S.W. 735. But joint resolutions of congress are not distinguishable from acts, if approved by the president or passed without his approval in the usual legislative manner. *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 A.L.R. 262; *State v Cunningham*, 39 Mont. 197, 103 Pac. 497; also see note in 18 Anno. Cas. 706.

¹⁵ *Sawyer v Collins*, 148 Iowa 712, 127 N.E. 1015; *State v Summers*, 33 S.D. 40, 144 N.W. 730, 50 L.R.A. 206.

¹⁶ *Cape Girardeau v Fougau*, 30 Mo. Ap. 551.

or temporary character.¹⁷ Even so, they constitute a form of legislation whereby rules are announced for the guidance of the agents and servants of the government.¹⁸

Under the constitutions of some states, however, joint resolutions are recognized as the equivalent of duly enacted statutes,¹⁹ so that, when all constitutional requirements have been met, they are given the force and effect of law. Where this situation exists, there is actually no real difference between a statute and a joint resolution, except for the manner of enactment.²⁰ And even though such a resolution may not have the force and effect of law, nevertheless it is an effective means of expressing the legislative will for administrative purposes and as such may be enforced.²¹ But in some states, we find an attempt to distinguish joint resolutions from concurrent resolutions. Thus, in Kansas a joint resolution is said to pertain to business between the two houses of the legislature and must be acted upon by both houses, while concurrent resolutions are used to express the will or sentiment of both houses and must also be acted upon by both houses.^{21a} There would seem, however, to be little necessity, or justification for making any distinction between them.

¹⁷ *Coleman v Miller*, 146 Kan. 390, 71 Pac. (2) 518; *Swann v. Buck*, 40 Miss. 268; *Ex parte Hague*, (N.J.) 144 Atl. 546.

¹⁸ *Hawes v Wm. R. Trigg Co.*, 110 Va. 165, 65 S.E. 538.

¹⁹ *Mullan v State*, 144 Cal. 578, 46 Pac. 670, 34 L.R.A. 262; *Burritt v State Commrs.*, 120 Ill. 322, 11 N.E. 180; *Coleman v Miller*, 146 Kan. 390, 71 Pac. (2) 518; *Olds v State Land Office*, 134 Mich. 442, 86 N.W. 956, 96 N.W. 508; *Swann v Buck*, 40 Miss. 268. Also see note in 18 Anno. Cas. 707.

²⁰ *Coleman v Miller*, 146 Kan. 390, 71 Pac. (2) 518; also see 14 Mich. S.B.J. 365, for attempt to distinguish a joint resolution from a bill.

²¹ *State v Bailey*, 16 Ind. 46, 79 Am.Dec. 405, *St. Paul R. Co. v Brown*, 24 Minn. 517, *In re Senate File No. 31*, 25 Neb. 864, 41 N.W. 981, *State v Dahl*, 6 N.D. 81, 68 N.W. 498, *State v Kinney*, 56 Ohio St. 721, 47 N.E. 569, *State v Thorson*, 9 S.D. 149, 68 N.W. 202, 33 L.R.A. 582, *State v Delesdenier*, 7 Tex. 76. "A 'resolution' is merely a legislative expression of an opinion on some given matter or thing, while 'law' permanently directs and controls matters applying to persons or things in general. *Ex Parte Hague*, 104 N.J. Eq. 31, 144 Atl. 618.

^{21a} See *Coleman v Miller*, 146 Kan. 390, 71 Pac. (2) 518, where ratification of the child-labor amendment by the passage of a concurrent resolution, was not a legislative act having the force of law so as to prevent the lieutenant governor from casting the deciding vote.

The following constitutes a typical concurrent resolution :

“HOUSE CONCURRENT RESOLUTION No. 14

“A Concurrent Resolution memorializing the congress of the United States and the members from Kansas to oppose the passage of any bill which makes provision for an increase in the number of judges of the Supreme Court.

“WHEREAS, The president has submitted to the congress a proposal for a reorganization of the judicial department; and

“WHEREAS, In such proposal the number of judges of the supreme court may be increased by the will of the president through the appointment of additional judges; now, therefore,

“BE IT RESOLVED, by the House of Representatives of the State of Kansas, the Senate concurring therein:

“That the congress of the United States is hereby respectfully requested to oppose any provision for an increase in the number of judges of the supreme court through the appointment, at the discretion of the president, of additional judges. That the members of congress from Kansas are hereby respectfully requested to vote against the passage of any bill which may include a provision for the increasing the number of judges of the supreme court. That the secretary of state is hereby authorized and directed to send copies of this resolution to the vice-president of the United States, the speaker of the House of Representatives of the United States, and to each member of the Kansas delegation in Congress.”—Laws, 1937, Ch. 389, p. 637

In a broad sense, a municipal ordinance is a statute.²² It is a regulation of a general and permanent nature enacted by the governing body or council of a municipal corporation.²³ It is a subordinate law, especially where the legislative authority of the municipality is derived from a legislative enactment,²⁴ rather than, as is sometimes the case, particularly with reference to the large cities, from the state constitution. Obviously, where the legislative power

²² *New Orleans Waterworks Co. v Louisiana Sugar Ref. Co.*, 125 U.S. 18, 31 L.Ed. 607, 8 S.Ct. 741, *John P. King Mfg. Co. v Augusta*, 277 U.S. 100, 72 L.Ed. 801, 48 S.Ct. 489, *Rutherford v Swink*, 96 Tenn. 564, 35 S.W. 554.

²³ *Shaub v Lancaster City*, 156 Pa. St. 362, 26 Atl. 1067, 21 L.R.A. 691.

²⁴ *Cruchfield v Bermudez Paving Co.*, 174 Ill. 466, 51 N.E. 552, 42 L.R.A. 347.

of the municipality is granted by a constitutional provision, its legislative acts, within the scope of the authority granted, are not subordinate to those of the state legislature. In any event, however, municipal ordinances must not conflict with the constitution, and, where the authority to legislate is derived from the legislature, they must not conflict with statutory law.²⁵ So it is apparent from the foregoing discussion that, while an ordinance may be the result of the exercise of legislative power by a political subdivision of the state, having all the force and effect of law within the limits of the municipality, it is not a statute in the common and ordinary sense or use of the term, and especially within its meaning as treated in this work.²⁶

§ 4. Source of Statute Law—In General.—Statutes owe their existence ordinarily to an act of that branch of the government known as the legislature and whose functions are legislative.²⁷ This power to enact law is conferred upon legislative bodies in various ways, depending, of course, upon the form of government established in the particular country involved.²⁸ Perhaps juridically, sovereignty rests in the government,²⁹ although, in the final anal-

²⁵ 2 McQuillan, *Mun. Corp.*, § 683.

²⁶ See § 1, *supra*. And for a treatment of the principles pertaining to the construction of ordinances, see 2 McQuillan, *Mun. Corp.*, Chapt. 18.

²⁷ Statutes, 59 *Corpus Juris* 523, § 9. See also *Dreyer v Pease*, 88 *Fed.* 978, *aff'd.* 176 U.S. 681, 44 L.Ed. 637, 20 S.Ct. 1025; *People v Roth*, 249 Ill. 532, 94 N.E. 953; *Schaake v Dolley*, 85 Kan. 598, 118 Pac. 80; *Merchants Exch. v Knott*, 212 Mo. 616, 111 S.W. 565; *Smithberger v Banning (Neb.)*, 262 N.W. 492; *Ford v New York Cent.*, 33 Ap. Div. 474, 53 N.Y.S. 764; *Darweger v Staats*, 153 Misc. 522, 275 N.Y.S. 394; *In re Starr*, 245 Ap.Div. 5, 280 N.Y.S. 753.

²⁸ Statutes, 59 *Corpus Juris* 523, § 9.

²⁹ "The state from which law emanates is juridically ultimate or sovereign, but this sovereignty, which, in the last resort, is manifested by the use of successful physical power, is simply the power derived from the social elements of which political society is materially constituted. There are limits in the scope of the factual power of political societies Essentially, a political society is a form of social compromise of many diverse and conflicting group interests While the state has succeeded in gaining factual power, yet, in the last resort, it still remains in essence an organized compromise of conflicting group interests." Kocurek, *Intro. to Science of Law*, § 31, pp. 115-6; also § 19.

ysis, it rests in the people.³⁰ They may consent that this sovereignty be exercised by the state, or they may confer or delegate it to the state; in either event, to be exercised by one man or a group of men. In this country, the people by the adoption of constitutions, have created legislatures upon which they have conferred the legislative power.³¹ But this power is divided and qualified; part is vested in the federal congress and part in the state legislatures.³² And, as we shall hereafter see,³³ there are numerous limitations upon the power.

§ 5. **Federal Statutes.**—By virtue of provisions of the federal constitution, the law making power of the federal government is vested in a congress consisting of a senate and a house of representatives.³⁴ But congress has legislative power only in respect to

³⁰ "The theory in our political system is, that the ultimate sovereignty is in the people, from whom spring all legitimate authority. They created the national government, and conferred upon it powers of sovereignty over certain subjects. Upon these subjects, it is supreme. They have also created state governments, upon which they conferred the remaining powers of sovereignty, so far as they allow them to be exercised at all."—Dwarris, *Statutes and Constitutions*, Chapt. II, pp. 63-64. "Although by their constitution, the people have delegated the exercise of sovereign power to the several departments, they have not thereby divested themselves of the sovereignty."—2 Cooley, *Const. Lim.* Chapt. XVII, p. 1349. The power to change the constitution, *National Prohibition cases*, 253 U.S. 350, and the power of revolution, *Wood's Appeal*, 75 Pa. 59, substantiate the view that the people are sovereign. Of course, in the final analysis, generally a majority of the people or a majority of the voters, really exercise sovereignty. *Stevenson, Nature and Interrelation of Sovereign States*, 38 *Am. Law Rev.* 551, *Briggs, Sovereignty and the Consent of the Governed*, 35 *Am. L. Rev.* 49, *Wickersham, Confused Sovereignty*, 11 *Ill. L.Rev.* 225.

³¹ *Koehler v Hill*, 60 *Iowa* 543, 14 *N.W.* 738, 15 *N.W.* 609; *State v Knapp*, 99 *Kan.* 852, 163 *Pac.* 181; *Gibson v Mason*, 5 *Nev.* 283; *State v Tufly*, 19 *Nev.* 391, 12 *Pac.* 835.

³² U.S. Const., Art. 1, § 1. See also *Chicago & N.W. R. Co. v Fuller (U.S.)*, 17 *Wall.* 560, 21 *L.Ed.* 710; *In re Guerra*, 95 *Vt.* 1, 110 *Atl.* 224. Also see *Moore v Shaw*, 17 *Calif.* 199. Some powers, however, may be exercised concurrently by both governments—state and national. *Hoke v U.S.*, 227 *U.S.* 308, 57 *L.Ed.* 523, 33 *S.Ct.* 281; also 11 *Am.Jur.* § 175.

³³ See *infra*, § 11.

³⁴ U.S. Const., Art. 1, § 1.

those matters or subjects enumerated in the constitution.³⁵ In other words, it has only those legislative powers delegated to it; all those not delegated have been retained by the states.³⁶ In its field, however, its enactments are supreme and binding on all the states and their inhabitants.³⁷

§ 6. State Statutes.—Under constitutional provisions, the legislative power of the several states is vested in a state legislature composed usually of two houses³⁸—a senate and a house of representatives, or their equivalent,³⁹ to be elected by the people, and in the subordinate legislative bodies for minor governmental subdivisions such as cities and counties.⁴⁰ The power of the state to legislate, however, is not unlimited,⁴¹ although statements are sometimes broad enough to convey a contrary impression. Limitations, expressed and implied, are imposed by the state constitution, the federal constitution and the treaties and acts of congress enacted under it.⁴² But regardless of these federal limitations, the state

³⁵ *Carter v Carter Coal Co.*, 298 U.S. 278, 80 L.Ed. 1160, 56 S.Ct. 855, *Martin v Hunter's Lease*, (U.S.) 1 Wheat. 304, 4 L.Ed. 97; *Marbury v Madison*, (U.S.) 1 Cranch 137, 2 L.Ed. 60; *U.S. v Dewitt* (U.S.) 9 Wall. 41, 19 L.Ed. 593; *Gibbons v Ogden* (U.S.) 9 Wheat. 1, 61 L.Ed. 23; *Educational Films Co. v Ward*, 282 U.S. 379, 75 L.Ed. 400, 51 S.Ct. 170. Also see 1 *Cooley*, Const. Lim. Chapt. V, p. 175.

³⁶ *Cummins v State of Mo.* (U.S.) 4 Wall. 277, 18 L.Ed. 356; *Bignell v Cummins*, 69 Mont. 294, 222 Pac. 797, 36 L.R.A. 634; *U.S. Fidelity Co. v Bramwell*, 108 Ore. 261, 217 Pac. 332, 32 A.L.R. 829.

³⁷ U.S. Const., Art. 6. See also *McCulloch v Maryland* (U.S.) 4 Wheat. 316, 4 L.Ed. 579; *Sanitary Dist. of Chicago v United States*, 266 U.S. 405, 69 L.Ed. 352, 45 S.Ct. 176, *Tennessee v Davis*, 100 U.S. 257.

³⁸ *Franklin Bridge Co. v Wood*, 14 Ga. 80; *People v Flagg*, 46 N.Y. 401.

³⁹ By a recent constitutional amendment, in Nebraska, the bicameral legislature has been abolished and a unicameral legislature created. See Const. of Neb., Art. III. Also note *Orfield, L.B., Unicameral Legislature in Nebraska* (1935) 34 Mich. L.Rev. 26-36, and *Horowitz, S.D., and Strahan, F., Unicameral Legislative System* (1936) 10 Fla. L.J. 239-43. And see *infra*, § 28, note 4.

⁴⁰ *Witter v Cook County*, 256 Ill. 616, 100 N.E. 148.

⁴¹ For further discussion of the various limitations, see § 11, *infra*.

⁴² *City of Chicago v Murphy*, 313 Ill. 98, 114 N.E. 802; *Connell v State*, 196 Ind. 421, 144 N.E. 882, reh. den. 196 Ind. 421, 148 N.E. 407; *Sears v Cottrell*, 5 Mich. 256; *Donnell v State*, 48 Miss. 679; *Blair v Ridgely*, 41 Mo. 63; *State v Summers*, 33 S.D. 40, 144 N.W. 730, 50 L.R.A. (n.s.) 206; *Terrell v Middleton (Tex.)* 187 S.W. 367; *Litchman v Shannon*, 90 Wash. 186, 155 Pac. 783.

legislature is supreme in its own particular sphere,⁴³ which, after all, is an extensive one.

§ 7. **Territorial Enactments.**⁴⁴—Territorial legislation, so far as the United States is concerned, does not now occupy the important position it formerly did. This has been due to the gradual disappearance of territories as such. Consequently, there is little need for anything except a summary treatment of the subject here.

It was early recognized⁴⁵ that the territories were subject to the legislative authority of congress,⁴⁶ by reasoning that since a territory is not within the jurisdiction of any particular state, it is therefore within the jurisdiction of the federal government, or because the right to govern is the inevitable consequence of the right to acquire territory.⁴⁷ At any rate, congress has full and complete legislative authority over the territories.⁴⁸ It may exercise this authority directly, or it may be delegated to designated agencies.⁴⁹ Such a delegation is lawful, for, while congress may not delegate its general powers of legislation on subjects affecting the whole people, it may, in respect to any designated district or territory outside all the states and therefore not within any state's absolute control, create a local legislative body and vest it with legislative power.⁵⁰ And the validity of the enactments of a territorial

⁴³ *Gibbons v Ogden* (U.S.) 9 Wheat. 1, 6 L.Ed. 23; *Cohens v Virginia* (U.S.) 6 Wheat. 264, 5 L.Ed. 257; *Ableman v Booth* (U.S.) 21 How. 506, 16 L.Ed. 169; *Tenn. v Davis*, 100 U.S. 251, 25 L.Ed. 648; *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717; *Donnell v State*, 48 Miss. 679.

⁴⁴ See also Max Farrand—*The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895* (1896).

⁴⁵ *American Ins. Co. v Canter* (U.S.) 1 Pet. 511, 7 L.Ed. 242. Also see *Dred Scott v Sanford* (U.S.) 19 How. 445, 15 L.Ed. 691.

⁴⁶ *First National Bank v Yankton*, 101 U.S. 129, 25 L.Ed. 1046.

⁴⁷ *American Ins. Co. v Canter* (U.S.) 1 Pet. 511, 7 L.Ed. 242; *Dred Scott v Sanford* (U.S.) 19 How. 445, 15 L.Ed. 691.

⁴⁸ *Dred Scott v Sanford* (U.S.) 19 How. 445, 15 L.Ed. 691.

⁴⁹ *U.S. v Heinzen*, 206 U.S. 370, 51 L.Ed. 1098, 27 S.Ct. 742; see also *Mormon Church v U.S.*, 136 U.S. 1, 34 L.Ed. 478, 10 S.Ct. 792; *Cope v Cope*, 137 U.S. 682, 34 L.Ed. 832, 11 S.Ct. 222; *Allen v Reed*, 10 Okla. 105, 63 Pac. 867; *Territory v O'Connor*, 5 Dak. 397, 41 N.W. 746, 3 L.R.A. 355.

⁵⁰ *Dorr v U.S.*, 195 U.S. 138, 49 L.Ed. 128, 24 S.Ct. 801; *McCormick v Western Union Tel. Co.* (C.C.A.—8th) 79 Fed. 449, 38 L.R.A. 684.

legislature depends upon a grant of legislative power from congress and conformance to the constitution of the United States.⁵¹ But, so far as the territories are concerned, the constitution is divided into two parts: the fundamental and the formal. Only the former controls the federal authorities in the government of the territories, and the Supreme Court will determine when specific cases arise what parts are fundamental and what parts are only formal.⁵² And where congressional legislation conflicts with the acts of the legislature of the territory, the former will prevail.⁵³ No conflict, however, will be presumed.⁵⁴ Moreover, congress has the plenary power to annul the legislative acts of the territorial legislature independently of statute.⁵⁵

⁵¹ *Ex parte Wilson*, 114 U.S. 429, 29 L.Ed. 89, 5 S.Ct. 935; *Mormon Church v U.S.*, 136 U.S. 1, 34 L.Ed. 478, 10 S.Ct. 792; *Cope v Cope*, 137 U.S. 682, 34 L.Ed. 832, 11 S.Ct. 222; *Stevenson v Moody*, 2 Idaho 260, 12 Pac. 902; *Territory v Guyott*, 9 Mont. 46, 22 Pac. 134. With reference to the constitution particularly, see *Territory v Blomberg*, 2 Ariz. 204, 11 Pac. 671, and *Territory v Daniels*, 6 Utah 288, 22 Pac. 159, 5 L.R.A. 444.

⁵² See *Downs v Bidwell*, 182 U.S. 244, *Dooley v U.S.*, 183 U.S. 197; *Dorr v U.S.*, 195 U.S. 138, 49 L.Ed. 128, 24 S.Ct. 801; *LeLima v Bidwell*, 182 U.S. 540. Also see *Beard*, *Readings in Am. Govt. and Politics* (3rd Ed.) p. 375.

⁵³ *Wright v Ynchausti & Co.*, 272 U.S. 640, 47 S.Ct. 229, 71 L.Ed. 454.

⁵⁴ *Kitawaga v Shipman*, 54 Fed. (2) 313.

⁵⁵ *Hammons v Watkins*, 33 Ariz. 76, 262 Pac. 616.

CHAPTER II

LEGISLATIVE POWER—GENERALLY

- § 8. Separation of Powers—In General.
- § 9. Origin and History of the Tripartite Theory.
- § 10. The Theory in Practice.
- § 11. Source, Extent and Limitations of Legislative Power—In General.
- § 12. The Common Law.
- § 13. The Judiciary, Generally.
- § 14. The Rule-Making Power of the Courts.

§ 8. **Separation of Powers—In General.**¹—It is a basic² and underlying principle of constitutional government in the United States that all governmental powers shall be divided into three departments — the legislative, the executive, and the judicial.³ Considerable care has obviously been taken in the wording of most constitutional provisions, federal⁴ as well as state, to commit the legislative, the executive, and the judicial functions to the appropriate department and to forbid any encroachment by one upon another in the exercise of their respective powers. It should be noted, however, that so far as the federal constitution is concerned, it contains no express provision prohibiting the officers of one department from exercising functions properly belonging to an-

¹ For further discussion of the separation of powers, see *infra* Chapt. III, The Delegation of Legislative Power.

² "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not simply a matter of convenience or of governmental mechanism. Its object is basic and vital; *Springer v Government of Philippine Islands*, 277 U.S. 189, 201; namely, to preclude a comingling of these essentially different powers of government in the same hands." *O'Donoghue v U.S.*, 289 U.S. 516, 77 L.Ed. 1356, 53 S.Ct. 740.

³ *O'Donoghue v U.S.*, 289 U.S. 516, 77 L.Ed. 1356, 53 S.Ct. 740; *Denver v Lynch*, 92 Colo. 102, 18 Pac. (2) 907, 86 A.L.R. 907; *People v Kelly*, 347 Ill. 221, 179 N.E. 898, 80 A.L.R. 890; *In re Opinion of Justices*, 279 Mass. 607, 180 N.E. 725, 81 A.L.R. 1059; *Simpson v Hill*, 128 Okla. 269, 263 Pac. 635, 56 A.L.R. 706; *Searle v Yensen*, 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257, *Langever v Miller*, 124 Tex. 80, 76 S.W. (2) 1025, 96 A.L.R. 836. Also see notes in 3 A.L.R. 451 and 69 A.L.R. 266.

⁴ U.S. Const., Art. 1, § 1, Art. II.

other. The inhibition arises by implication.⁵ But, on the other hand, many of the state constitutions go so far as to provide specifically that neither department shall exercise any powers belonging to either of the others.⁶ Some provide that no officer of one department shall exercise any powers belonging to either of the others, except in the instances expressly directed and permitted by the constitution.⁷ And so far as any state is concerned, all governmental powers might be commingled without violating the Federal Constitution.⁸

§ 9. **Origin and History of the Tripartite Theory.**⁹—This tripartite theory of the separation of governmental powers, at the time of its adoption in America, was not new.¹⁰ Aristotle had noted it.¹¹ Montesquieu had declared it to be essential to civil liberty,¹² and the theory was made familiar to the framers of the early American constitutions, including the federal constitution of 1787, by his great treatise.¹³ Locke also had his influence.¹⁴ Blackstone¹⁵ and the constitution makers¹⁶ regarded it as a most admirable feature of

⁵ *Ex parte Lasswell*, 1 Cal. Ap. (2) 183, 36 Pac. (2) 678; *Portland v Bangor*, 65 Me. 120; *Ex Parte Grossman*, 267 U.S. 87.

⁶ See Const. Law, 12 Corpus Juris 803, for pertinent constitutional citations.

⁷ *Louisville R. Co. v Greenbrier Distillery Co.*, 170 Ky., 775, 187 S.W. 296; *In re Brinckwirth's Estate*, 268 Mo. 86, 186 S.W. 1048.

⁸ *Winchester, etc., R. R. v. Comm.*, 106 Va. 264, 55 S.E. 692. Also see *Forsythe v Hammond*, 166 U.S. 506. Similarly, the constitutional division of government into the three departments does not apply to municipal governments. *Sarlls v State*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; *State v Truder*, 35 N.M. 49, 289 Pac. 594.

⁹ See also Beard—*American Government and Politics* (3rd Ed.), pp. 152-55.

¹⁰ For general history, see *State ex rel Patterson v Bates*, 96 Minn. 110, 104 N.W. 709.

¹¹ *Politics*, bk. 6, Chapt. XI, § 1.

¹² For quotation from Montesquieu, see *Western Union Tel. Co. v Myatt*, 98 Fed. 335, 348.

¹³ *Esprit des Lois*. Also see *Richardson v Young*, 122 Tenn. 471, 125 S.W. 664.

¹⁴ Sharp, *The Classical Am. Doctrine of the Separation of Powers*. 2 U.Chi.L.Rev. 385.

¹⁵ 1 Blackstone, *Commentaries*, 269.

¹⁶ *The Federalist*, No. 47.

the English constitution, although actually such a separation of powers did not exist under that constitution.¹⁷ The theory apparently was first practically applied in America.¹⁸ Under the colonial system of Virginia, where the judges sat in the legislature, the bill of rights of 1776 provided "that the legislative and executive powers of the state should be separate and distinct from the judiciary".¹⁹ This distributive clause with variations was afterwards inserted in other early state constitutions and later adopted by many of the new states. Today, with only a few exceptions,²⁰ all of the state constitutions contain a provision of this character providing for the separation of the powers of government into the three departments.²¹ And obviously the purpose of separating governmental powers was to protect the social interest in our personal liberty and our political institutions. It was intended as a check on the tyranny of either division, lest some powerful person might overthrow the government and destroy personal liberty, by obtaining complete control of all governmental agencies.²²

§ 10. The Theory in Practice.—The tripartite theory of the separation of governmental powers has been subject to considerable criticism by some political scientists.²³ They claim that such power can only be divided into two parts—the policy forming and the administrative. Moreover, in actual practice, the theory has never

¹⁷ Baghot, *English Const.*, Chapt. 8; Story, *Const.*, § 528; also see Brown—*The Law of England During the Period of the Commonwealth*, 6 *Ind. L.J.* 359.

¹⁸ *Kilbourn v Thompson*, 103 U.S. 168, 26 L.Ed. 377.

¹⁹ *The Federalist*, Nos. 47 and 49.

²⁰ Kansas, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin, apparently, constitute the exceptions.

²¹ See *Const. Law*, 12 *Corpus Juris*, 802, § 235, note 7, for citation to the constitutional provisions of such states; also see Dodd, *State Government* (3rd Ed.) 58.

²² See *Western Union v Myatt*, 98 Fed. 335.

²³ "Modern political science has, however, generally discarded this theory both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization The flaw in Montesquieu's reasoning and in that of his followers, was the assumption that the expressions of the governmental power by different authorities were different powers." Goodnow, *Comp. Adm. Law*, 20, 21. Also see Cooley, *Const. Lim.*, p. 44; Ford, *Rise and Growth of American Politics*. For a defense of the theory, see 10 *Political Science Quarterly*, 420.

been entirely true.²⁴ Even the courts have recognized that the separation of governmental powers into three departments is far from complete and that the lines of demarcation are often vague and indefinite.²⁵ An analysis will reveal that each of the three departments frequently exercises certain powers which are not strictly within its province,²⁶ especially if the tripartite theory is rigidly applied. For instance, the executive shares the legislative power when he uses the veto,²⁷ and the judicial power in passing on claims.²⁸ The legislature exercises executive power in making appointments²⁹ and the judicial power in paying³⁰ and adjusting claims,³¹ or in granting divorces,³² or inflicting punishment for contempt.³³ Even the courts use legislative power in rendering decisions which modify existing law.³⁴ It is, therefore, apparent that the division of governmental powers into the legislative, the executive, and the judicial, is an abstract and general division and probably was never intended to be strictly adhered to in actual operation.³⁵ Nor does it mean, from a practical standpoint, that they must remain completely separate and distinct with no connecting

²⁴ For an analytical discussion of this theory of government, see Kocourek, Intro. to Science of Law, §§ 26, 27, 28, 29 and 30.

²⁵ *Den v Hoboken Land Co. (U.S.)* 18 How. 272, 15 L.Ed. 372; *Chicago & N.W. R. Co. v Dey*, 35 Fed. 866, 1 L.R.A. 744; *Baltimore v State*, 15 Md. 376; *Jonason v Crosley*, 92 Minn. 176, 99 N.W. 636; *State v Cir. Judge*, 50 N.J.L. 585, 1 L.R.A. 86; *Brown v Turner*, 70 N.C. 93; *Richardson v Young*, 122 Tenn. 471, 125 S.W. 664; *State v Pub. Serv. Comm. (Wash.)* 162 Pac. 523.

²⁶ Kocurek, Intro. to Science of Law, § 26. Also see *Fox v McDonald*, 101 Ala. 51, 13 So. 416, 21 L.R.A. 529; *Cooper v Telfair*, 4 Dall. (U.S.) 14, 1 L.Ed. 721.

²⁷ See in re Opinion of Court, 23 Fla. 297, 6 So. 925.

²⁸ *Watkins v Holman (U.S.)* 16 Pet. 25, 10 L.Ed. 873.

²⁹ *Baltimore v State*, 15 Md. 376.

³⁰ *Dickens v Carr*, 84 Mo. 658; In re Senate Bill, 21 Colo. 69, 39 Pac. 1088.

³¹ *Watkins v Holman (U.S.)* 16 Pet. 25, 10 L.Ed. 873.

³² *Maynard v Hill*, 125 U.S. 190. However, on this matter, there is a difference of opinion, although the prevailing view is in accord with the above text. For further treatment, see *Cooley*, Const. Lim. Chapt. V, pp. 208-213.

³³ *Anderson v Dunn*, 6 Wheat. (U.S.) 204; In re Chapman, 166 U.S. 661.

³⁴ See 9 Law Quart. Rev. 106 (1893).

³⁵ Ex parte Grossman, 267 U.S. 87, 69 L.Ed. 527, 45 S.Ct. 332, *State v Duval County*, 76 Fla. 180, 79 So. 692; *Brown v Turner*, 70 N.C. 93; also see *People v Kelly*, 347 Ill. 221, 179 N.E. 898, 80 A.L.R. 890; *State v Schumaker*, 200 Ind. 716, 164 N.E. 408; *Sabre v Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693; *Re Hull*, 163 Minn. 439, 204 N.W. 534, 49 A.L.R. 320.

link.³⁶ All three departments derive their authority from the same source,³⁷ and, although their powers differ, they represent the sovereignty in equal degree.³⁸ They are co-ordinate departments of the government, and as such are politically connected.³⁹ They are mutually dependent and could not exist without the assistance of each other, for one makes the laws, another executes them, and the other expounds them. Yet, the functions and the powers are not blended,⁴⁰ although sometimes the powers theoretically belonging to one department are exercised by another either at the express direction of law⁴¹ or incidentally as a means of exercising the power properly within its own domain.⁴² Each department must perform the duties assigned to it, and should not exercise those powers properly belonging to either of the other departments.⁴³ And the powers properly belonging to each department are to be determined by a consideration of the language and intent of the constitution, together with history, the nature of powers, limitations, and purposes of governments.⁴⁴

³⁶ Story, Const. § 525.

³⁷ *State ex rel Mueller v Thompson*, 149 Wis. 488, 137 N.W. 20.

³⁸ *People v Brady*, 275 Ill. 26, 114 N.E. 25; *In re Simms*, 54 Kan. 1, 37 Pac. 135, 25 L.R.A. 110; *Albright v Fisher*, 164 Mo. 56, 64 S.W. 106, *Morris v Taylor*, 70 W.Va. 618, 74 S.E. 872.

³⁹ *Brown v Turner*, 70 N.C. 93; *Hale v State*, 55 Ohio St. 210, 45 N.E. 199, 36 L.R.A. 254; *State v Cannon*, 206 Wis. 374, 240 N.W. 441. And the extent and character of assistance by one branch of another must be fixed according to common sense and inherent necessities of governmental co-ordination. *J. W. Hampton, Jr., & Co. v U.S.*, 276 U.S. 394, 72 L.Ed. 624, 48 S.Ct. 348.

⁴⁰ For a good discussion of this text, see Const. Law, 6 R.C.L., § 146, 11 Am.Jur., § 183.

⁴¹ *State v Clapp*, 50 Minn. 239, 52 N.W. 655.

⁴² *Wyman v Southard (U.S.)* 10 Wheat, 1, 6 L.Ed. 253; *Watkins v Holman (U.S.)* 16 Pet. 25, 10 L.Ed. 873; *State v City of Jacksonville (Fla.)* 133 So. 114, *Auditor v Atchison R. Co.*, 6 Kan. 500; *Flint & F. Plank Rd. Co. v Woodhull*, 25 Mich. 99; *Taylor v Place*, 4 R.I. 324. And note *J. W. Hampton, Jr., & Co. v U.S.*, 276 U.S. 394, 72 L.Ed. 624, 48 S.Ct. 348; *Stockman v Leddy*, 55 Colo. 24, 129 Pac. 220.

⁴³ *Parks v Libby-Owens-Ford Glass Co.*, 360 Ill. 130, 195 N.E. 616. Also see *Coleman v Miller*, 146 Kan. 390, 71 Pac. (2) 518; *Rouse v Johnson*, 234 Ky. 473, 28 S.W. (2) 745.

⁴⁴ *Florida Motor Lines v Railroad Comr's.*, 100 Fla. 538, 129 So. 876.

§ 11. **Source, Extent and Limitations of Legislative Power—In General.**—As has already been stated, the legislative power of the United States has been vested in congress⁴⁵ and the legislative power of the states vested in their respective legislatures.⁴⁶ Usually, this power is granted in broad and general terms.⁴⁷ It is not defined but is distributed by name.⁴⁸ Generally, it may be described as the power to make, alter, amend and repeal laws,⁴⁹ or, more concisely, to legislate; but it also includes such powers as may be necessary to carry the constitution into effect.⁵⁰ Frequently, in order to determine its scope and limit, resort must be had to the intrinsic nature of the power, as well as to its history.⁵¹

But constitutional provisions may prohibit the legislature from exercising powers clearly legislative in character⁵² or may reserve them for the people to be exercised directly by them through the initiative and referendum.⁵³ Legislative power may also be subject

⁴⁵ See § 5, *supra*.

⁴⁶ See § 6, *supra*.

⁴⁷ *State v Duval County*, 76 Fla. 180, 79 So. 692. Also see *Ex parte Lasswell*, 1 Cal. Ap. (2) 183, 36 Pac. (2) 678.

⁴⁸ *Richardson v Young*, 122 Tenn. 471, 125 S.W. 664. Also see note 47, *ibid*.

⁴⁹ *Mitchell v Lowden*, 288 Ill. 327, 123 N.W. 566; *State v Denny*, 118 Ind. 382, 21 N.E. 252; *Ellingham v Dye*, 178 Ind. 336, 99 N.E. 1; *Harsha v Detroit*, 261 Mich. 586, 246 N.W. 849, 90 A.L.R. 853; *State v Armstead*, 103 Miss. 790, 60 So. 778; *Todd v Reynolds (Mo.)* 199 S.W. 173; *State v Whisman*, 36 S.D. 260, 154 N.W. 707; *Hutchinson v Braxton County Court*, 100 W.Va. 461, 130 S.E. 654; *Richardson v Young*, 122 Tenn. 471, 125 S.W. 664. "Legislative power is the power to enact laws, or declare what the law shall be." *People v Hawkins*, 324 Ill. 285, 155 N.E. 318.

⁵⁰ *U.S. v. 11,150 Pounds Butter*, 195 Fed. 657, 115 C.C.A. 463; *Booth v Comm.*, 130 Ky. 38, 113 S.W. 61; *Comm. v Plaisted*, 148 Mass. 375, 19 N.E. 244, 2 L.R.A. 142; *State v Shields*, 4 Mo. Ap. 259; *Stevens v Benson*, 50 Ore. 269, 91 Pac. 577; *Langever v Miller*, 124 Tex. 80, 76 S.W. (2) 1025, 96 A.L.R. 836, reh. den., 73 S.W. (2) 634. *In re East Contra Costa Irr. Dist.*, 10 Fed. Supp. 175. Also note definition in *Green*, *Separation of Governmental Powers*, 29 Yale L.J. 369, 373.

⁵¹ *Florida Motor Lines v Railroad Comr's.*, 100 Fla. 538, 129 So. 876; *Prentis v Atlantic Coast Line Co.*, 211 U.S. 210.

⁵² *Nougues v Douglas*, 7 Cal. 65; *State v Gordon*, 251 Mo. 303, 158 S.W. 683; *Matter of Clinton St. (Pa.)* 2 Brewst. 599.

⁵³ *Smithberger v Banning (Neb.)* 262 N.W. 492; also see *Kalich v Knapp*, 73 Ore. 558, 142 Pac. 594, 145 Pac. 22. Also see § 21, *infra*.

to express limitations by virtue of constitutional provisions.⁵⁴ For example, provisions of this type may be found which state that the legislative power shall be limited by the principles announced in the bill of rights,⁵⁵ or that the enumeration of rights shall not be construed so as to impair or to deny others retained by the people.⁵⁶ The legislative power may also be limited by implied restrictions or limitations.⁵⁷ These are frequently found either in the language of the constitution,⁵⁸ or in the evident purpose in view, or from the circumstances and historical events which led to the enactment or adoption of the particular provision involved.⁵⁹ It is also stated by some authorities that a further limitation upon legislative authority is imposed by the fundamental nature and purposes of our system of government, although not repugnant to any expressed

⁵⁴ *White v Decatur*, 225 Ala. 646, 144 So. 873, 86 A.L.R. 914; *Adams v Spillyards*, 187 Ark. 641, 61 S.W. (2) 686, 86 A.L.R. 1493; *Stark County v Henry County*, 326 Ill. 535, 158 N.E. 116, 54 A.L.R. 777; *People v White*, 334 Ill. 465, 166 N.E. 100, 64 A.L.R. 1006; *Tierney Coal Co v Smith*, 180 Ky. 815, 203 S.W. 731; 4 A.L.R. 1540; *Idaho Power Co. v Blomquist*, 26 Idaho 222; *Laughlin v Portland*, 111 Me. 186, 90 Atl. 318; *Harsha v Detroit*, 261 Mich. 586, 246 N. W. 849, 90 A.L.R. 853; *Williams v Evans*, 139 Minn. 32, 165 N.W. 495, 166 N.W. 504; *State v Merchants Exch.*, 269 Mo. 346, 190 S.W. 903; *State ex rel Pub. Ser. Comm. v Brannon*, 86 Mont. 200, 283 Pac. 202, 67 A.L.R. 1020; *Jenkins v State Bd. of Elections*, 180 N.C. 169, 104 S.E. 346, 14 A.L.R. 1247; *State ex rel Cleveringa v Klein*, 63 N.D. 514, 249 N.W. 118, 86 A.L.R. 1523; *State v Summers*, 33 S.D. 40, 144 N.W. 730, 50 L.R.A. (N.S.) 206; *Peay v Nolan*, 157 Tenn. 222, 7 S.W. (2) 815, 60 A.L.R. 408; *Rio Grand Lumber Co. v Darke*, 50 Utah 114, 167 Pac. 241; *Booten v Pinson*, 77 W.Va. 412, 89 S.E. 985; *Robb v Tacoma*, 175 Wash. 580, 28 Pac. (2) 327, 91 A.L.R. 1010; *Krenz v Nichols*, 197 Wis. 394, 222 N.W. 300, 62 A.L.R. 466; *Donnelly v Roosevelt*, 259 N.Y.S. 356, 144 Misc. 525.

⁵⁵ *Beach v Bradstreet*, 85 Conn. 344, 82 Atl. 1030; *Sharpless v Philadelphia*, 21 Pa. St. 147; *White's Appeal*, 287 Pa. 259, 134 Atl. 409, 53 A.L.R. 1215.

⁵⁶ *McCullough v Brown*, 41 S.C. 220, 19 S.E. 458; *State v Aiken*, 42 S.C. 222, 20 S.E. 221, 26 L.R.A. 345.

⁵⁷ *State v Fox*, 158 Ind. 126, 63 N.E. 19, 56 L.R.A. 893; *L. E. Tierney Coal Co. v Smith*, 180 Ky. 815, 203 S.W. 731, 4 A.L.R. 1540; *State v Taylor*, 33 N.D. 76, 156 N.W. 561; *Rathbone v Wirth*, 150 N.Y. 459, 45 N.E. 15, 34 L.R.A. 408; *Page v Allen*, 58 Pa. St. 338; *State v Whisman*, 36 S.D. 260, 154 N.W. 707.

⁵⁸ *Donnelly v Roosevelt*, 259 N.Y.S. 356, 144 Misc. 525.

⁵⁹ *State v Fox*, 158 Ind. 126, 63 N.E. 19, 56 L.R.A. 893; *Ex parte Lewis (Tex.)* 73 S.W. 811.

provision of restriction or limitation in the constitution.⁶⁰ But an analysis of this statement in the light of the decisions, reveals, unfortunately, that it may not be true.⁶¹ The cases seem to indicate that some limiting provision, express or implied, in the constitution has been violated.⁶² In other words, the courts do not declare legislative acts void merely because opposed to the spirit of the constitution, unless some constitutional provision has been violated.⁶³ Similarly, a law cannot be declared void merely because it is in opposition to representative government, unless it violates some provision in the constitution.⁶⁴ Nor can the court declare a statute void solely on the ground that it contains certain unjust and oppressive provisions or because it is supposed to violate natural, social, or political rights, unless such statute violates the constitution.⁶⁵

From all of the foregoing, it is obvious, even if one only casually examines the provisions of our various constitutions, that arbitrary power is not vested in the legislature,⁶⁶ although inherently and constitutionally the legislative power is a very extensive

⁶⁰ See Const. Law, 6 R.C.L. § 153, 11 Am.Jur., Const. Law, § 194. Also see *Chicago, etc., R. Co. v. Chicago*, 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581; *Lexington v. Thompson*, 113 Ky. 549, 68 S.W. 477, 57 L.R.A. 775; *Taylor v. Porter*, 4 Hill (N.Y.) 140.

⁶¹ See *Cooley*, Const. Lim., Chapt. VII, p. 351.

⁶² *Cooley*, Const. Lim., Chapt. VII, p. 351. Also see *Cochran v. Van Surly* (N.Y.) 20 Wend. 382, and *Brewer v. Blougher* (U.S.) 14 Pet. 198.

⁶³ *Jackson v. Mass.*, 197 U.S. 11, 49 L.Ed. 643, 25 S.Ct. 358; *Lexington v. Thompson*, 113 Ky. 540, 68 S.W. 477, 57 L.R.A. 775; *Russ v. Comm.*, 210 Pa. St. 544, 60 Atl. 169, 1 L.R.A. (n.s.) 409; but see *McDonald v. Doust*, 11 Idaho 14, 81 Pac. 60, 69 L.R.A. 220.

⁶⁴ *State v. Mankato*, 177 Minn. 458, 136 N.W. 264, 41 L.R.A. (n.s.) 111; *Busser v. Snyder*, 282 Pa. 440, 128 Atl. 80, 37 A.L.R. 1515.

⁶⁵ *License Tax Cases* (U.S.) 5 Wall. 462, 18 L.Ed. 497; *McCray v. U.S.*, 195 U.S. 27, 49 L.Ed. 78, 24 S.Ct. 769. But see the preferable view expressed in *Hudspeth v. Swayze*, 35 N.J.L. 592, 89 Atl. 780, that those immutable principles which lie at the very foundation of society are legitimate restraints or limitations upon the legislative power.

⁶⁶ *State v. Stewart*, 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307; *State ex rel LaFollette*, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348. Also see *People v. Hawkins*, 324 Ill. 285, 155 N.E. 318.

one.⁶⁷ There are certain boundaries beyond which the legislature cannot go.

§ 12. **The Common Law.**—It may be said as a general rule that the power of the legislature is not limited or restricted by the common law.⁶⁸ Instead, the legislature has the power to modify or to alter it.⁶⁹ In fact, no person has a property or vested right in any rule of the common law.⁷⁰ Accordingly, the state may make any change it desires with reference to administrative and remedial processes,⁷¹ and create new duties and new liabilities.⁷² But, of course, property rights which have been created by the common law, cannot be destroyed or taken away without meeting the requirements of due process, although the law itself, as a rule of conduct, may be changed at the will of the legislature, unless such a change is prohibited by the constitution. The legislature may also, as a general rule, make almost any act a crime, in the absence of constitutional inhibition, although the act previously was not criminal, and regardless of whether moral turpitude is involved in such

⁶⁷ See *Donnelly v Roosevelt*, 259 N.Y.S. 356, 144 Misc. 525. "The legislature of the state has power to determine primarily what measures are appropriate or needful for the protection of the public morals, public health, or public safety, subject to judicial review." *Rowekamp v Mercantile, etc., Bank*, 72 Fed. (2) 852. "That the legislature, in the absence of constitutional restraint, is all-powerful in dealing with matters of legislation, it must be conceded" *State ex rel French v Stone*, 224 Ala. 234, 139 So. 328. Also see *Mason v State*, 58 Ohio St. 30, 50 N.E. 6, 41 L.R.A. 291; *Booten v Pinson*, 77 W.Va. 412, 89 S.E. 985.

⁶⁸ *People v Kirk*, 162 Ill. 138, 45 N.E. 830.

⁶⁹ *Liberty Warehouse Co. v Burley*, 276 U.S. 71, 72 L.Ed. 473, 48 S.Ct. 291; *Silver v Silver*, 280 U.S. 117, 74 L.Ed. 221, 50 S.Ct. 57, 65 A.L.R. 939; *Greenberg v Western Turf Ass'n*, 148 Cal. 126, 82 Pac. 684; *Congdon v Congdon*, 160 Minn. 343, 200 N.W. 76; *People v Mallon*, 22 N.Y. 456, 119 N.E. 102, 4 A.L.R. 463; *Henley v State*, 98 Tenn. 665, 41 S.W. 352, 39 L.R.A. 126; *Nance v Houch Piano Co.*, 128 Tenn. 1, 155 S.W. 1172; *Miller v Letzerich*, 121 Tex. 248, 49 S.W. (2) 404, 85 A.L.R. 451.

⁷⁰ *Truax v Corrigan*, 257 U.S. 312, 66 L.Ed. 254, 42 S.Ct. 124, 27 A.L.R. 375; *State v Heldenbrand*, 62 Neb. 136, 87 N.W. 25.

⁷¹ *McKinster v Sager*, 163 Ind. 671, 72 N.E. 854, 68 L.R.A. 273; *Miller v Letzerich*, 121 Tex. 248, 49 S.W. (2) 404, 85 A.L.R. 451.

⁷² *Ives v So. Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431, 34 L.R.A. (n.s.) 162; *Miller v Letzerich*, 121 Tex. 248, 49 S.W. (2) 404, 85 A.L.R. 51.

act.⁷³ This does not mean, however, that the legislature can declare any act criminal in total disregard of its real nature. There must be some connection with, or relation to the public health, safety, or welfare, or to some exercise of the police power of the state by the legislature.⁷⁴ Rather than being a limitation upon the power of the legislature, the common law is a foundation upon which a better system of jurisprudence can be built, for after all, in both civil and criminal law, one great office of statutes is to correct the defects of the common law as they are revealed or developed by an advancing society and to adapt our legal system to the changes thus wrought by time and circumstances.⁷⁵

§ 13. The Judiciary, Generally.—The right of the legislature to exercise judicial power is negated by the tripartite theory of the separation of governmental powers.⁷⁶ Under this theory, as well as under our constitutions, all judicial power is lodged with the judiciary department⁷⁷ and all legislative power with the legislature.⁷⁸ As is true with the term "legislative power",⁷⁹ the term "judicial power" is not capable of any exact definition,⁸⁰ nor is any attempt made in the various constitutions to define its scope or nature.⁸¹ Generally, it may be defined as the power to declare

⁷³ *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L.R.A. 55; *Des Moines v Manhattan Oil Co.*, 193 Iowa 1096, 184 N.W. 921, 23 A.L.R. 1322; *Ex parte Berger*, 193 Mo. 16, 90 S.W. 759, 3 L.R.A. (n.s.) 530; *State v Park*, 42 Nev. 386, 178 Pac. 389, 3 A.L.R. 75; *Rhodes v Sperry*, 193 N.Y. 223, 85 N.E. 1097.

⁷⁴ *Gillespie v People*, 188 Ill. 176, 58 N.E. 1007, 52 L.R.A. 283; *Coffeyville Bridge & Tele. Co. v Perry*, 69 Kan. 297, 76 Pac. 848; 66 L.R.A. 185; *Barker v People*, 3 Cow. (N.Y.) 686; *Lawton v Steele*, 119 N.Y. 226, 23 N.E. 878, 7 L.R.A. 134.

⁷⁵ *Second Employers Liability Cases*, 223 U.S. 1, 56 L.Ed. 327, 32 S.Ct. 169, and *Munn v Illinois*, 94 U.S. 113, 24 L.Ed. 77, 94 (Mr. Justice Field's dissent). Also see Pound, *Making Law and Finding Law* (1916), 82 Cent. L.J. 351, 353.

⁷⁶ *Kilbourn v Thompson*, 103 U.S. 168, 26 L.Ed. 377; *Langever v Miller*, 124 Tex. 80, 76 S.W. (2) 1025, 96 A.L.R. 836, reh. den., 73 S.W. (2) 634.

⁷⁷ See *Florentine v Barton* (U.S.) 2 Wall. 210, 17 L.Ed. 783; *Preveslin v Derby Developing Co.*, 112 Conn. 129, 151 Atl. 518, 70 A.L.R. 1246; *People v Kelly*, 347 Ill. 221, 179 N.E. 898, 80 A.L.R. 890; *In re Opinion of Justices*, 279 Mass. 607, 180 N.E. 725, 81 A.L.R. 1059.

⁷⁸ See § 10, *supra*.

⁷⁹ See § 10, *supra*.

⁸⁰ *State v Creamer*, 85 Ohio St. 349, 97 N.E. 602.

⁸¹ *DeCamp v Archibald*, 50 Ohio St. 618, 35 N.E. 1056.

what the law is or has been, as distinguished from the power vested in the legislature to declare what the law should be.⁸² It is that power exclusively vested in the judiciary department of government and conferred on judicial tribunals to administer punitive and remedial justice to and between persons subject to, or claiming rights under, the law of the land.⁸³

It is that power of a court to investigate, declare, and enforce liabilities as they stand on present or past facts under laws already in existence.⁸⁴ It is the power to adjudicate on the legal rights of persons or property,⁸⁵ and, obviously, in order to perform these functions, the power of the court to construe and interpret the enactments of the legislature logically follows as a matter of course. This power of statutory construction and interpretation, so far as American jurisprudence is concerned, is clearly vested in the judiciary.⁸⁶

But there are some exceptions to the general principle that all questions of a judicial nature must be decided by the courts. By virtue of constitutional provisions, the legislature may determine the guilt of an official who has been duly impeached.⁸⁷ Legislatures often allow or deny claims for money.⁸⁸ And in some juris-

⁸² *Fenske Bros. v. Upholsterer's Inter. Union*, 358 Ill. 239, 193 N.E. 112, 97 A.L.R. 1318; cert. den. 295 U.S. 734, 79 L.Ed. 1682, 55 S.Ct. 645; also see *People v White*, 334 Ill. 465, 166 N.E. 100, 64 A.L.R. 1006; *Rohde v Newport*, 246 Ky. 476, 55 S.W. (2) 368, 87 A.L.R. 701; *Goetz v Black*, 256 Mich. 564, 240 N.W. 94, 84 A.L.R. 802; *Am. State Bank v Jones*, 184 Minn. 498, 239 N.W. 144, 78 A.L.R. 770.

⁸³ See *Shumway v Bennett*, 29 Mich. 460. "Judicial power is the power which adjudicates upon the rights of citizens, and to that end construes and applies the law." *People v Hawkins*, 324 Ill. 285, 155 N.E. 318. Also see § 157, *infra*, for further treatment of the boundaries of the legislative power so far as the judicial power of interpretation is concerned.

⁸⁴ *Ross v Oregon*, 227 U.S. 150, 57 L.Ed. 458, 33 S.Ct. 220. Also see *Gordon v Lowry*, 116 Neb. 359, 217 N.W. 610; *Prentiss v Atlantic Coast Line Co.*, 211 U.S. 210.

⁸⁵ *People v Bird*, 212 Calif. 632, 300 Pac. 23.

⁸⁶ *Waters v State*, 25 Ala. Ap. 144, 142 So. 113; *People v Hawkins*, 324 Ill. 285, 155 N.E. 318; *State ex rel Parish Board of Health v. Police Jury*, 161 La. 1, 108 So. 104; *West et al v Sun Cab Co.*, 160 Md. 476, 154 Atl. 100; *Epps v McCallum Realty Co.*, 139 S.C. 481, 138 S.E. 297.

⁸⁷ See U.S. Constitution, Art. 1, § 3.

⁸⁸ *In re Senate Bill*, 21 Colo. 69, 39 Pac. 1088; *State v Gibson*, 26 Ohio Cir. Ct. 784.

dictions, attempts—some of which were successful—⁸⁹ have been made to create further exceptions. Nor are the courts completely beyond the control of the legislature, although the legislature cannot exercise, as a general rule, powers which are strictly judicial in nature,⁹⁰ nor interfere with the scope of their jurisdiction where it is fixed by the constitution.⁹¹ For instance, some courts, even though established by the constitution, are dependent upon the legislature for a definition of the scope and extent of their jurisdiction,⁹² or for a determination of the number of judges who shall compose the court.⁹³ Legislatures also enact rules or codes of procedure under which the courts are to function,⁹⁴ or they may authorize the courts to promulgate such rules.⁹⁵ Since the power to promulgate rules of procedure is considered judicial, the legislature may clearly delegate it to the courts.⁹⁶ But there is a grow-

⁸⁹ In some states, divorces are granted by the legislature, but some authorities contend that the granting of divorces is not the exercise of judicial but of legislative power. *Cooley, Const. Limit., Chapt. V, pp. 208-13.* And the legislature has been permitted to determine whether a particular corporation has violated provisions of its charter. *Crease v. Babcock*, 23 Pick. (Mass.) 334. *Contra: In re Opinion of Justices*, 237 Mass. 619, 131 N.E. 29; *Flint & F. Plank Rd. Co. v. Woodhull*, 25 Mich. 99. And in California there was a recent but incomplete attempt to grant a legislative pardon.

⁹⁰ *Florentine v. Barton (U.S.)* 2 Wall 210, 17 L.Ed. 783; *Preveslin v. Derby Developing Co.*, 112 Conn. 129, 151 Atl. 518, 70 A.L.R. 1246; *People v. Kelly*, 347 Ill. 221, 179 N.E. 898, 80 A.L.R. 890; *In re Opinion of Justices*, 279 Mass. 607, 180 N.E. 725, 81 A.L.R. 1059.

⁹¹ *In re Brown's Estate*, 65 Colo. 341, 176 Pac. 477; *Stephenson v. Chicago, Etc., R. Co.*, 303 Ill. 49, 135 N.E. 68; *Tinker v. Sauer*, 105 Ohio St. 135, 136 N.E. 854.

⁹² *Duncan v. Fox (Fla.D.C.)* 300 Fed. 165; *In re Kellner's Estate (N.J.)* 165 Atl. 585. If the constitution defines the court's jurisdiction, the legislature cannot alter it. *Wilson v. Lucas*, 185 Ark. 183, 47 S.W. (2) 8; *Werner v. Rowley*, 129 Ohio St. 527, 196 N.E. 267.

⁹³ *White v. Arkansas & Missouri Highway Dist.*, 147 Ark. 160, 227 S.W. 261; *Miller & Lux v. Secara*, 193 Calif. 755, 227 Pac. 171; *Keith v. Common.*, 197 Ky. 362, 247 S.W. 42; *Shamlan v. Equitable Acc. Co.*, 226 Mass. 67, 115 N.E. 46; *Steamboat Canal Co. v. Garson*, 43 Neb. 298, 185 Pac. 801; *reh. den.*, 43 Neb. 298, 185 Pac. 1119.

⁹⁴ See *infra*, § 14.

⁹⁵ *In re Constitutionality of Statute Empowering Supreme Court to Promulgate Rules*, 204 Wis. 501, 236 N.W. 717.

⁹⁶ *Ibid.* Also see *Hanna v. Mitchell*, 196 N.Y.Sup. 43, 51.

ing tendency upon the part of the courts to assert that they have the inherent right to make their own rules of procedure, even without statutory authorization.⁹⁷

§ 14. The Rule-Making Power of the Courts. An examination of the various decisions involving the power of the courts to formulate rules of procedure, reveals considerable conflict.⁹⁸ The earlier cases,⁹⁹ and perhaps some of relatively recent origin,¹⁰⁰ regard the formulation of rules of procedure a matter in which the legislature is supreme. Obviously, where this rule is followed, the courts cannot exercise the rule-making power without a constitutional or legislative authorization. Opposed to the cases representing the view that the rule-making power is lodged in the legislature, we find a number of recent decisions which announce and apply the doctrine that the rule-making power in the field of procedure is inherently and exclusively vested in the judiciary.¹⁰¹ As a result, if this doctrine is applied, the courts would need no constitutional or legislative authorization in order to legally formulate

⁹⁷ *People v Callopy* (Ill.) 194 N.E. 634. See *infra*, § 14, for more detailed discussion of the power of the courts to promulgate and to make rules of procedure.

⁹⁸ For additional discussion of this problem, see *The Rule-Making Power—A Bibliography*, 16 A.B.A.J. 199-202; Hyde, L. M., *From Common Law Rules to Rules of Court*, 22 Wash. U. Law Quarterly, 187 (1937), McCormick, C. T., *Legislature and Supreme Court Clash on Rule-Making Power*, 27 Ill. L. Rev. 664 (1932), Paul, *The Rule Making Power of the Court*, 1 Wash. L. Rev. 163 (1925), Pound, *The Rule-Making Power of the Courts*, 12 Am.B.A.J. 599 (1926). All Legislative Rules for Judicial Procedure Are Void Constitutionally, Wigmore, 23 Ill. Law Rev., 276 (1928), Williams, Tyrrell—*The Source of Authority for Rules of Court Affecting Procedure*, 22 Wash. U. Law Quarterly, 460 (1938). For construction of statutes simplifying procedure and rules of court, see *supra*, § 235.

⁹⁹ *Vanatta v Anderson* (Pa.) 3 Binn. 417; *Thompson v Hatch* (Mass.) 3 Pick. 512; *Risher v Thomas*, 2 Mo. 98.

¹⁰⁰ See *McMann v Hamilton*, 202 Calif. 319, 260 Pac. 793; *State ex rel Order of Moose v Miller*, 216 Mo. Ap. 692, 273 S.W. 122; *Carroll v Quaker City Cab Co.*, 308 Pa. 345, 162 Atl. 258. Also see *In re Waugh*, 32 Wash. 50, 72 Pac. 710. And in *State ex rel Jones v Presson* (Okla.) 77 Pac. (2) 38, although the power to fix terms of court belongs to the legislature, in the absence of constitutional limitation, that power could properly be delegated to the courts.

¹⁰¹ *Kolkman v People*, 89 Colo. 8, 300 Pac. 575; *State v Roy*, 40 N.Mex. 397, 60 Pac. (2) 646. Also see *State ex rel McKittrick v Dudley & Co., Inc.*, (Mo.) 102 S.W. (2) 895.

rules of procedure. And technically, therefore, any legislative authorization must be regarded as unconstitutional.¹⁰² Furthermore, in addition to these two opposing doctrines, there is what may be designated an intermediate view. Under it, the courts may promulgate rules of procedure, provided the legislature has not promulgated rules by legislation.¹⁰³ In other words, it is contended that to permit the court to make rules of procedure to supercede or alter legislation already existing thereon, amounts to an unlawful delegation of legislative power.¹⁰⁴ Analytically, a great deal may be said in favor of this attitude. If the rule-making power is a judicial power, then the legislature should not exercise it. On the other hand, if the rule-making power is a legislative power, the enactment of a statute conferring the power on the courts to make rules which will abrogate or supercede existing legislation clearly constitutes an unlawful delegation of legislative power to the courts.

¹⁰² See Wigmore: All Legislative Rules for Judicial Procedure are Void Constitutionally, 23 Ill. Law Rev. 163 (1925).

¹⁰³ *Ernst v Lamb*, 73 Colo. 132, 213 Pac. 994; *Barber v State*, 197 Ind. 88, 149 N.E. 896.

¹⁰⁴ But note that the prevailing tendency is to regard the delegation as lawful. *State v Roy*, 40 N.Mex. 397, 60 Pac. (2) 646; *State ex rel Lumber Co. v Superior Court*, 148 Wash. 1, 267 Pac. 770; *In re Constitutionality of Statute*, 204 Wis. 501, 236 N.W. 717. These cases, however, avoid the real problem by refusing to determine whether the power is legislative or judicial; they regard it as a hybrid.

CHAPTER III

DELEGATION OF LEGISLATIVE POWER

- § 15. In General.
- § 16. Power to Ascertain Facts.
- § 17. Power to Promulgate Rules and Regulations.
- § 18. Power to Create Crimes.
- § 19. Power to Proclaim or to Suspend the Effectiveness of Legislative Enactments.
- § 20. Power of the People to Suspend and to Make Legislative Enactments Effective—In General.
- § 21. The Initiative and Referendum.
- § 22. Local Option.
- § 23. Delegation of Legislative Power to the Judiciary.
- § 24. Delegation of Legislative Power to Political Subdivisions—Counties, Municipal Corporations, etc.
- § 25. Delegation of Legislative Powers to Private Persons or to Corporations.
- § 26. Fields in Which the Delegation of Legislative Power Predominates.
- § 27. Some Present Day Trends.

§ 15. **In General.**—Inasmuch as the legislative power of the government is vested exclusively in the legislature in accordance with the doctrine of the separation of powers,¹ the general rule is that the legislature cannot surrender or abdicate such power.² As a result, any attempt to do so, is unconstitutional and void.³ Nor can this power to make laws be delegated by the legislature

¹ 11 Am.Juris. 921, § 214; Cooley, Const. Limit., Chapt. 5, p. 224. Also see *supra*, Chapt. II, Legislative Power, Generally.

² *State v Davis*, 178 Ark. 153, 10 S.W. (2) 513; *Pursley v Ft. Myers*, 37 Fla. 428, 100 So. 366; *Oakland State Bank v Bolin*, 141 Kan. 126, 40 Pac. (2) 437; *State v Watkins*, 176 La. 837, 147 So. 8; *Wilder v Murphy*, 56 N.D. 436, 218 N.W. 156; *Peterson v Grayce Oil Co. (Tex.)* 37 S.W. (2) 367. See also *Panama Ref. Co. v Ryan*, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241; *Schechter v U.S.*, 295 U.S. 595, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947.

³ *Ibid.*

to any other authority⁴—*delegatus non potest delegare*. A power, however, which is not legislative in character may be delegated.⁵ If the power, on the other hand, is clearly legislative in nature and exclusively belongs to the legislative department of the government, its delegation by the legislature will be unconstitutional.⁶ Obviously, the difficulty lies in determining what powers belong exclusively to the legislative department. The courts have, however, announced a number of principles by which the legality of any delegation of legislative power may be determined, but the application of these principles is not and has not been easy, as will appear from the further discussion in this chapter. As a general rule, it would seem to be the nature of the power rather than the manner in which it is exercised by the administrative officer, which determines whether the delegation is lawful.⁷

Questions pertaining to the delegation of legislative powers to executive and administrative officers arose soon after the adop-

⁴ U.S. v Shreveport Grain Co., 287 U.S. 77, 77 L.Ed. 175, 53 S.Ct. 42; Sawyer v U.S., 10 Fed. (2) 416, U.S. v D. Santo, 20 Fed. Supp. 254; Pursley v Ft. Myers, 87 Fla. 428, 100 So. 366; State v Nelson, 36 Idaho 713, 213 Pac. 358; People v Barnett, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044; Sarlls v State, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; Blume v Crawford County, 217 Iowa 545, 250 N.W. 733, 92 A.L.R. 757; Ashland Transf. Co. v State Tax Comm., 247 Ky. 144, 56 S.W. (2) 691, 87 A.L.R. 534; State v Gauthier, 121 Me. 522, 118 Atl. 380, 26 A.L.R. 652; Williams v Evans, 139 Minn. 32, 165 N.W. 495, 166 N.W. 504; Rowe v Ray, 120 Neb. 118, 231 N.W. 639, 70 A.L.R. 1056; Hudspeth v Swayze, 85 N.J.L. 592, 89 Atl. 780; Korth v Portland, 123 Ore. 180, 261 Pac. 895, 58 A.L.R. 665; Am. Baseball Club v Pennsylvania, 321 Pa. 311, 167 Atl. 891, 92 A.L.R. 386; Brown v Humble Oil & Ref. Co. (Tex.) 83 S.W. (2) 935, 99 A.L.R. 1107, reh. den., 87 S.W. (2) 1069; Thompson v Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604.

⁵ Interstate Commerce Comm. v Goodrich Transit Co., 224 U.S. 194, 56 L.Ed. 729, 32 S.Ct. 436; Panama Ref. Co. v Ryan, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241; Hurst v Warner, 102 Mich. 238, 60 N.W. 440, 26 L.R.A. 484; Sabre v Rutland R. Co., 86 Vt. 347, 85 Atl. 693.

⁶ Selective Draft Cases, 245 U.S. 366, 62 L.Ed. 352, 38 S.Ct. 159, Travelers Ins. Co. v Industrial Comm., 71 Colo. 495, 208 Pac. 465; State v Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969; Livesay v DeArmond, 131 Ore. 563, 284 Pac. 166, 68 A.L.R. 422; State ex rel Chicago, Etc., R. Co. v Public Serv. Comm., 94 Wash. 274, 162 Pac. 523.

⁷ Panama Ref. Co. v Ryan, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241; Zuber v Southern R. Co., 9 Ga. Ap. 539, 71 S.E. 937. Also note State v Fowler, 94 Fla. 752, 114 So. 435, that the paramount test by which to determine whether a statute invalidly delegates legislative power, is the statute's completeness. For further discussion of the above text, see 11 Am. Jur. § 215.

tion of our various constitutions. Since then there has been a constant as well as a steadily increasing stream of questions of this type. Legislative power has been delegated, as a general rule, not so often as an effort to break down the tripartite theory of the separation of powers, but from necessity and for the sake of convenience. More and more, with a social system steadily becoming increasingly complex, the legislature has been obliged, in order to legislate effectively, efficiently and expeditiously, to delegate some of its functions, not purely legislative in character, to other agencies, particularly to administrative officials and boards.⁸ Most prominent among the powers thus delegated have been the power to ascertain facts, and the power to promulgate rules and regulations. Many of the other delegated powers, upon analysis, fall within one of these two major or basic classifications.⁹

So far, however, as the delegation of any power to an executive official or administrative board is concerned, the legislature must declare the policy of the law and fix the legal principles which are to control in given cases and must provide a standard to guide the official or the board empowered to execute the law.¹⁰ This standard must not be too indefinite or general. It may be laid down in broad general terms.¹¹ It is sufficient if the legislature will lay down "an intelligible principle" to guide the execu-

⁸ *State v. Public Serv. Comm.* (Wash.) 162 Pac. 523.

⁹ Baesler, *A Suggested Classification of the Decisions on Delegation of Legislative Power*, 15 Boston U.L. Rev. 507.

¹⁰ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241, *Schechter v U.S.*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947; *People v. Beekman*, 347 Ill. 92, 179 N.E. 435. Also note *State v. Williams*, 196 Wis. 472, 220 N.W. 929.

¹¹ *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230, 59 L.Ed. 552, 35 S.Ct. 387; *Sabre v Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693. If a too precise and exacting standard were required, there would be little advantage derived from delegated power. An example of a standard quite general in its limitations, may be found in *McGrew v. Industrial Comm.* (Utah) 85 Pac. (2) 608, where the court held the delegation proper under a minimum wage law which required the industrial commission to determine that wages being paid in the industry are inadequate to proper living; or that the hours of employment are so long as to be dangerous to health or general welfare of the workers; or that the standard conditions of labor are against the general welfare or health of the employees. Similarly, the requirement that the holders purchased by the commissioner for distribution to the public shall possess quality, appearance and usability, was considered sufficiently definite and specific. *Kryder v State* (Ind.) 15 N.E. (2) 386.

tive or administrative official,¹² or goes "as far as was reasonably practicable under the circumstances existing",¹³ or if the rule laid down was "reasonable and in the interest of the public interest".¹⁴ From these typical criterions, it is apparent that the courts exercise considerable liberality toward upholding legislative delegations, if a standard is established. Such delegations are not subject to the objection that legislative power has been unlawfully delegated.¹⁵ The filling in of mere matters of detail within the policy of, and according to the legal principles and standards established by the legislature, is essentially ministerial rather than legislative in character,¹⁶ even if considerable discretion is conferred upon the delegated authority.¹⁷ In fact, the method and manner of enforcing a law must be left to the reasonable discretion of administrative officers, under legislative standards.¹⁸ It should be noted, however, that the standard established in criminal statutes must be more exacting and precise, if the statute is to avoid being fatally defective for vagueness and uncertainty,¹⁹ since criminal statutes are strictly construed by the courts.²⁰

§ 16. Power to Ascertain Facts.—One of the contingencies upon which the operation of a statute may be made dependent, is the ascertainment of facts by the executive or administrative of-

¹² *J. W. Hampton, Jr., & Co. v U.S.*, 276 U.S. 394, 72 L.Ed. 624, 48 S.Ct. 348.

¹³ *U.S. v Chemical Foundation*, 272 U.S. 1, 71 L.Ed. 131, 47 S.Ct. 1.

¹⁴ *Avent v U.S.*, 266 U.S. 127, 69 L.Ed. 202, 45 S.Ct. 34. And see *New York Cent. Securities Corp. v U.S.*, 287 U.S. 12, 77 L.Ed. 138, 53 S.Ct. 45, where "the public interest" was held a sufficient standard.

¹⁵ *Southern R. Co. v Common.*, 159 Va. 779, 167 S.E. 578.

¹⁶ *Thompson v Smith*, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604.

¹⁷ *Railroad Comm. v Alabama N. R. Co.*, 182 Ala. 357, 62 So. 749; *State ex rel Young v Duval County*, 76 Fla. 180, 79 So. 692. See also *Tilley v Savannah (C.C.A.)* 5 Fed. 641; *Chicago v Stratton*, 162 Ill. 494, 44 N.E. 853, 35 L.R.A. 84; *Schmidt v Gould*, 172 Minn. 179, 215 N.W. 215; *Livesay v DeArmond*, 131 Ore. 563, 284 Pac. 166, 68 A.L.R. 422. Consequently, where the administrative officer was required to determine, before issuing a license, whether the use of property will be detrimental to public safety or welfare, the delegation was lawful and the officer could refuse to license a theatre at a certain location because of traffic hazards. *Small v Moss (N.Y.)* 18 N.E. (2) 281.

¹⁸ *Sheldon v Hoyne*, 261 Ill. 222, 103 N.E. 1021. See also *Idaho Power & Light Co. v Blomquist*, 26 Idaho 222.

¹⁹ *Mahler v Eby*, 264 U.S. 32, 68 L.Ed. 549, 44 S.Ct. 283.

²⁰ Chapt. XXIII, § 240, *infra*.

ficer or board.²¹ In other words, the legislature may lawfully delegate the power to such an officer or board, to determine some fact or set of facts upon which the operation of the law is to depend.²² This is not a legislative function.²³ Such action by the officer or board is administrative and not legislative in character, since they do not in effect determine what the law shall be, or exercise a primary or independent discretion, but only determine, within prescribed limits, some fact or set of facts upon which the law by its own terms operates.²⁴ A discretion may also be vested in executive officers or administrative boards, to determine when particular cases come within the rules established by a statute

²¹ *McCreless v Tenn. Valley Bk.*, 208 Ala. 414, 94 So. 722.

²² *Field v Clark*, 143 U.S. 649, 36 L.Ed. 294, 12 S.Ct. 495; *Union Bridge Co. v U.S.*, 204 U.S. 364, 51 L.Ed. 523, 27 S.Ct. 367; *U.S. v Grimaud*, 220 U.S. 506, 55 L.Ed. 563, 31 S.Ct. 480; *Commerce Comm. v Goodrich Transit Co.*, 224 U.S. 194, 56 L.Ed. 729, 32 S.Ct. 436; *Hawkins v Bleakley*, 243 U.S. 210, 61 L.Ed. 678, 37 S.Ct. 255; *Panama Refining Co. v Ryan*, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241; *Schechter v U.S.*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947; *McCreless v Tenn. Valley Bk.*, 208 Ala. 414, 94 So. 722; *People v Barnett*, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044; *Eckerson v Des Moines*, 137 Iowa 452, 115 N.W. 177; *Phoenix Ins. Co. v Welch*, 29 Kan. 480; *Ashland Transf. Co. v State Tax Comm.*, 247 Ky. 144, 56 S.W. (2) 691, 87 A.L.R. 534; *Rock v Carney*, 216 Mich. 280, 185 N.W. 798, 22 A.L.R. 1178; *Fassing v State*, 95 Ohio St. 232, 116 N.E. 104; *Stattler v O'Hara*, 69 Ore. 519, 139 Pac. 743; *Locke's Appeal*, 72 Pa. 491, 13 Am.Rep. 716; *Thompson v Smith*, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604. Pursuant to this principle, under a general statute giving to a state board of health the power to restrict and suppress contagious and infectious diseases, such board had the authority to designate such diseases as are contagious and infectious, and the law was not void for this reason on the ground that it delegates legislative power. *Kryder v State (Ind.)* 15 N.E. (2) 386.

²³ *Ward v State*, 154 Ala. 227, 45 So. 655; *State v Anklam (Ariz.)* 31 Pac. (2) 888; *Colo. & S.R. Co. v Railroad Comm.*, 54 Colo. 64, 129 Pac. 506; *State ex rel Young v Duval County*, 76 Fla. 180, 79 So. 692; *Chambers v McCollum*, 47 Idaho 74, 272 Pac. 707; *Louisville H. & St. L. R. Co. v Lyons*, 155 Ky. 396, 159 S.W. 971; *Schmidt v Gould*, 172 Minn. 179, 215 N.W. 215; *State v Haessler Inv. Co.*, 306 Mo. 392, 257 S.W. 632, affd. 271 U.S. 647, 70 L.Ed. 1131, 46 S.Ct. 487; *Livesay v DeArmond*, 131 Ore. 563, 284 Pac. 166, 68 A.L.R. 422; *Locke's Appeal*, 72 Pa. 491, 13 Am.Rep. 716; *Leeper v State*, 103 Tenn. 500, 53 S.W. 962, 48 L.R.A. 167; *Minneapolis, St. P. & S. Ste. M. R. Co. v Railroad Comm.*, 136 Wis. 146, 116 N.W. 905.

²⁴ *State v Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969; *State ex rel Young v Duval County*, 76 Fla. 180, 79 So. 692; *Livesay v DeArmond*, 131 Ore. 563, 284 Pac. 166, 68 A.L.R. 422; *DeAgostina v Parkshire*, 287 N.Y.S. 622, 155 Misc. 518.

imposing certain prohibitions.²⁵ From this it may be seen that it is not necessary for the legislature to ascertain the facts of, or to deal with each individual case separately.²⁶

§ 17. Power to Promulgate Rules and Regulations.—The legislature can, as we have already indicated,²⁷ under certain circumstances, delegate to executive officers and administrative boards, the authority to adopt and promulgate rules and regulations.²⁸ Before such a delegation is lawful, however, the legislature must declare the policy of the law and fix the legal principles which are to control in given cases;²⁹ that is, a definite or primary standard must be provided to guide those empowered to execute the

²⁵ *Miller v New York*, 109 U.S. 385, 27 L.Ed. 971, 3 S.Ct. 228; *Union Bridge Co. v U.S.*, 204 U.S. 364, 51 L.Ed. 523, 27 S.Ct. 367; *Monongahela Bridge Co. v U.S.*, 216 U.S. 177, 54 L.Ed. 435, 30 S.Ct. 356; *Conn v Sission*, 189 Mass. 247, 75 N.E. 619; *Saratoga Springs v Saratoga Gas. Co.*, 191 N.Y. 123, 83 N.E. 696; *Winslow v Fleischner*, 112 Ore. 23, 228 Pac. 101, 34 A.L.R. 826.

²⁶ *U.S. v Chemical Foundation*, 272 U.S. 1, 71 L.Ed. 131, 47 S.Ct. 1.

²⁷ See § 15, *supra*.

²⁸ *Wallace v Currin*, 95 Fed. (2) 856; *Alabama Pub. Serv. Comm. v Mobile Gas Co.*, 213 Ala. 50, 104 So. 538, 41 A.L.R. 872; *People v Brady*, 271 Ill. 100, 110 N.E. 864; *Rock v Carney*, 216 Mich. 280, 185 N.W. 798, 22 A.L.R. 1178; *Pub. Serv. Comm. v St. L. S. F. R. Co.*, 301 Mo. 157, 256 S.W. 226; *Insurance Co. of North America v Welch*, 40 Okla. 620, 154 Pac. 48; *O'Brien v Ammerman (Tex.)* 233 S.W. 1016; *Sabre v Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693; *Sutherland v Miller*, 79 W.Va. 796, 91 S.E. 993. "The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestrained discretion in applying a law; but it may enact a law complete in itself, designated to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for complete operation and enforcement of the law within its expressed general purpose." *State ex rel Field v Smith*, 329 Mo. 1019, 49 S.W. (2) 74.

²⁹ *Panama Refining Co. v Ryan*, 293 U.S. 388, 79 L.Ed. 446, 55 S.Ct. 241; *Schechter v U.S.*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947. Also see note in 79 L.Ed. 474.

law.³⁰ So long as a policy is laid down and a proper standard³¹ established by statute, there is no unconstitutional delegation of legislative power when the legislature leaves to selected instrumentalities, the duty of making subordinate rules within the prescribed limits,³² even though there is conferred upon the officer or board a large measure of discretion.³³ As can be readily seen, there is a distinction between the delegation of power to make a law and the conferring of an authority or discretion to be exercised under and in pursuance of the law, as the power to make law necessarily involves a discretion as to what it shall be.³⁴ The authority to make rules and regulations in order to carry out an express legislative purpose, or to effect the operation and enforcement of a law, is not a power exclusively legislative in character but is rather administrative in its nature.³⁵ The rules and regulations adopted and promulgated, however, must not subvert³⁶ nor be contrary to existing statutes.³⁷ And in sustaining grants of

³⁰ Ibid. Also see *U.S. v Grimaud*, 220 U.S. 506, 55 L.Ed. 563, 31 S.Ct. 480; *U.S. v Shreveport Grain Elev. Co.*, 287 U.S. 77, 77 L.Ed. 175, 53 S.Ct. 42; *State ex rel Young v Duval County*, 76 Fla. 180, 79 So. 692; *Southern R. Co. v Melton*, 133 Ga. 277, 65 S.E. 665; *Chambers v McCollum*, 47 Idaho 74, 272 Pac. 707; *McKenney v Farnsworth*, 121 Me. 450, 118 Atl. 237; *Clark v State*, 169 Miss. 369, 152 So. 820; *Green v State Civil Serv. Comm.*, 90 Ohio St. 252, 107 N.E. 531; *Santee Mills v Query*, 122 S.C. 153, 115 S.E. 202; *Leeper v State*, 103 Tenn. 500, 53 S.W. 962, 48 L.R.A. 167; *Brown v Humble Oil Co. (Tex.)* 83 S.W. (2) 935, 99 A.L.R. 1107, reh. den. 87 S.W. (2) 1069; *Uden v Greenough*, 181 Wash. 412, 43 Pac. (2) 983, 98 A.L.R. 1181; *Phillips v Rector of Univ.*, 97 Va. 472, 34 S.E. 66. And see notes in 92 A.L.R. 400.

³¹ For discussion of standards, see § 15, *supra*. That the establishment of a standard of conduct is a non-delegable legislative function, see *State v Larson (N.J.)* 160 Atl. 556.

³² See cases under note 30, *supra*.

³³ *People v Monterey Fish Pro. Co.*, 195 Cal. 548, 234 Pac. 398, 38 A.L.R. 1186; *Goldman v Crowther*, 147 Md. 282, 128 Atl. 50, 38 A.L.R. 1455; and see *Schmidt v Gould*, 172 Minn. 179, 215 N.W. 215; *Livesay v DeArmond*, 131 Ore. 563, 284 Pac. 166, 68 A.L.R. 422; *State ex rel Chicago, etc., R. Co. v Pub. Serv. Comm.*, 94 Wash. 274, 162 Pac. 523. Also see § 16, notes 25 and 26, *supra*.

³⁴ Ibid. Also see *Parks v Libby-Owens-Ford Glass Co.*, 360 Ill. 130, 195 N.E. 616.

³⁵ *State v Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969. And see *Powell, Separation of Powers*, 80 U.Pa. Law Rev. 129.

³⁶ *St. Louis Independent Packing Co. v Houston (C.C.A.)* 215 Fed. 553.

³⁷ *McKinney v Farnsworth*, 121 Me. 450, 118 Atl. 237.

power, the courts have been guided considerably by considerations of expediency;³⁸ they have recognized that a certain degree of delegation is essential to the efficient and effective operation of government³⁹ and that in some situations the legislature must leave to executive officers and administrative boards, the duty of carrying out the mandate of the statute.⁴⁰ As we have already stated,⁴¹ some cooperation between the several departments of government is necessary, as well as desirable. Its extent should be determined according to common sense and the inherent necessities of governmental coordination and with proper regard to personal and property rights.

§ 18. Power to Create Crimes.—The legislature cannot lawfully delegate the power to declare what acts shall constitute criminal offenses to executive officers and administrative boards,⁴² although the authority may be delegated to make and to promulgate rules, regulations, and orders on specific subjects and to provide that a violation of any such rules, regulations, and orders shall be

³⁸ *Sawyer v U.S. (C.C.A.)* 10 Fed. (2) 416. "Again, there is a strong presumption for our conclusion in the proposition previously stated that it is not a delegation of legislative power in violation of the constitution to grant to some designated body powers which the legislature cannot itself practically and efficiently exercise In other words, that the exercise of that particular type of authority is read as an exception into the general language of limitation of the constitution is merely tantamount to saying that the constitution itself does not require the impracticable or the impossible." *Trimmer v Carleton*, 116 Tex. 572, 296 S.W. 1070.

³⁹ *Schechter v U.S.*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947; *Idaho Power & Light Co. v Blomquist*, 26 Idaho 222.

⁴⁰ *Railroad Comm. v Alabama N.R. Co.*, 182 Ala. 357, 62 So. 749; *Craig v O'Rear*, 199 Ky. 553, 251 S.W. 828.

⁴¹ See § 10, *supra*.

⁴² *Standard Oil Co. v Limestone County*, 220 Ala. 231, 124 So. 523; *State v Anklam (Ariz.)* 31 Pac. (2) 888; *Ex Parte McNulty*, 77 Cal. 164, 19 Pac. 237; *Ex Parte Leslie*, 87 Tex. Crim. Rep. 476, 223 S.W. 227; *Tuttle v Wood (Tex.)* 35 S.W. (2) 1061; *Sutherland v Miller*, 79 W.Va. 796, 91 S.E. 993. Also see note in 79 L.Ed. 491.

punishable as provided in the statute.⁴³ As we have seen,⁴⁴ there is no constitutional prohibition against leaving to selected instrumentalities, the power to make subordinate rules within prescribed limits, provided a policy is laid down by the statute and definite standards established. In accord with the foregoing rule, in order to create criminal liability, there must always be a statutory declaration of what shall constitute the criminal offense, and the penalty must be fixed by the statute.⁴⁵ Where this is done, there is no delegation of legislative authority.⁴⁶ But it is important to remember that the legislative standard in criminal cases must be sufficiently precise that, even after the application of the rule that criminal statutes will be strictly construed against the state, the enactment will not be invalid for indefiniteness.⁴⁷

§ 19. Power to Proclaim or to Suspend the Effectiveness of Legislative Enactments.—Closely akin to, if not a part of the power to ascertain facts upon which the operation of a law is to depend, is the power to issue a proclamation declaring a specified enactment to be thenceforth, or from a given date, in effect. The same is true with the power to suspend the effectiveness of a given

⁴³ U.S. v Grimaud, 220 U.S. 506, 55 L.Ed. 563, 31 S.Ct. 480; *Avent v U.S.*, 266 U.S. 127, 69 L.Ed. 202, 45 S.Ct. 34; *U.S. v Griffin*, 12 Fed. Supp. 135; *State v McCarty*, 5 Ala. Ap. 212, 59 So. 545; *State v Anklaam (Ariz.)* 31 Pac. (2) 888; *Howard v State*, 154 Ark. 430, 242 S.W. 818; *People v Lange*, 48 Colo. 428, 110 Pac. 68; *State v Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969; *Zuber v Southern R. Co.*, 9 Ga. Ap. 539, 71 S.E. 937; *Marshall v Dept. of Agric.*, 44 Idaho 440, 258 Pac. 171; *Peo. v Tait*, 261 Ill. 197, 103 N.E. 750; *Pierce v Doolittle*, 130 Iowa 333, 106 N.W. 751, 6 L.R.A. (n.s.) 143; *State v Crawford*, 104 Kan. 941, 177 Pac. 360; *State v Snyder*, 131 La. 145, 59 So. 44; *In re Opinion of Justices*, 138 Mass. 601; *Hurst v Warner*, 102 Mich. 238, 60 N.W. 440, 26 L.R.A. 484; *Hawkins v Hoye*, 108 Miss. 282, 66 So. 721; *State v Hodges*, 180 N.C. 751, 105 S.E. 417. Note, however, that most of these cases involved misdemeanors.

⁴⁴ See § 17, *supra*.

⁴⁵ *Richmond Hosiery Mills v Camp*, 7 Fed. Sup. 139, *aff'd* 74 Fed. (2) 200; *Howard v State*, 154 Ark. 430, 242 S.W. 818; *Bailey v Van Pelt*, 78 Fla. 337, 82 So. 789; *State v Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969; *Zuber v Southern R. Co.*, 9 Ga. Ap. 539, 71 S.E. 937. See also *U.S. v Breen*, 40 Fed. 402, and *Tuttle v Wood (Tex.)* 35 S.W. (2) 1061.

⁴⁶ *Pierce v Doolittle*, 130 Iowa 333, 106 N.W. 751, 6 L.R.A. (n.s.) 143 and note; also *Re Kollock*, 165 U.S. 526, 41 L.Ed. 813, 17 S.Ct. 444.

⁴⁷ See *infra*, Chapter XIX, § 193. And note *National G.N. Ry. v Mallard (Tex.)* 277 S.W. 1051, and 5 Tex. Law Rev. 529.

legislative act. Both of these powers, if they be considered separate powers, are frequently delegated to the executive. The power to proclaim the effectiveness of a law is sustained by virtue of the general rule that a law does not necessarily have to take effect after it leaves the legislature but its effectiveness may be made to depend upon the happening of some future event or contingency.⁴⁸ One of these contingencies, is the voluntary act of some designated person or officer.⁴⁹ It may be the issuance of a proclamation by the executive.⁵⁰ Upon this same reasoning, the executive or an administrative board may be authorized to suspend the operation of a statute by a proclamation when satisfied with certain facts,⁵¹ although the power to suspend laws is vested solely in the legislature.⁵² But the suspension by the executive or by the administrative board, must be based upon some condition, contingency, exigency, or state of facts, declared by the legislature in the enactment to be sufficient to warrant the suspension by the executive.⁵³ Such an authorization is not considered a delegation of legislative power, since nothing is left to his determination

⁴⁸ *State v Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969; *Sarlls v State*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; *People v White*, 334 Ill. 465, 166 N.E. 100, 64 A.L.R. 1006; *Commonwealth v Beaver Dam Coal Co.*, 194 Ky. 34, 237 S.W. 1086; *State v Crawford*, 36 N.D. 385, 162 N.W. 710; *Hudspeth v Swayze*, 85 N.J.L. 592, 89 Atl. 780; *Ex Parte Mode*, 77 Tex. Crim. 432, 180 S.W. 708.

⁴⁹ *People ex rel Wilson v Salomon*, 51 Ill. 37; *Guild v Chicago*, 82 Ill. 472. See also *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543. But see *Ex parte Wall*, 48 Cal. 279; *Scott v Clark*, 1 Iowa 70, and *Pilkey v Gleason*, 1 Iowa 522.

⁵⁰ *The Aurora v U.S. (U.S.)* 7 Cranch. 382, 3 L.Ed. 378; *Consolidated Coal Co. v. Ill.*, 185 U.S. 203, 22 S.Ct. 616, 46 L.Ed. 872; *State v Rasmussen*, 7 Idaho 1, 59 Pac. 933, 52 L.R.A. 78. The revival of a statute may also be made dependent on a proclamation. *Union Bridge Co. v U.S.*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523.

⁵¹ *State ex rel Porterie v Grosjean*, 182 La. 298, 161 So. 871. Thus, in *Tatum v Wheeler (Miss.)* 178 So. 95, there was no unlawful delegation of legislative power, even though the Unemployment Compensation Law authorized its suspension for not more than six months if the governor finds that the Federal Social Security Act has been amended or repealed or declared unconstitutional by the Federal Supreme Court, thereby subjecting Mississippi employers to competitive disadvantage.

⁵² *McCreless v Tenn. Valley Bank*, 208 Ala. 414, 94 So. 722.

⁵³ *Winslow v Fleischner*, 112 Ore. 23, 228 Pac. 101, 34 A.L.R. 826.

which involves the expediency or just operation of the legislation.⁵⁴ Obviously, since the power of the executive officer or administrative board to suspend, is delegated by the legislature, its validity in turn rests upon the validity of the power of the legislature to suspend the operation of a statute.⁵⁵ Even the power of the legislature in this respect is not without limitation. The only restriction, however, on the legislative power to suspend the effectiveness of a general law, is that the suspension be uniform, both in the privileges conferred and in the liabilities imposed in its application to all persons and property similarly situated and in like condition.⁵⁶

§ 20. Power of the People to Suspend and to Make Legislative Enactments Effective—In General.—The power to pass, repeal, or suspend laws, as a general rule, cannot be delegated by the legislature to the people.⁵⁷ As a result, in the absence of constitutional provisions, the people cannot directly initiate and enact legislation,⁵⁸ nor can the legislature, according to most decisions, without constitutional authorization, leave the question to the determination of the people or voters of the whole state whether or not a given

⁵⁴ *Field v Clark*, 143 U.S. 649, 36 L.Ed. 294, 12 S.Ct. 495; *Union Bridge Co. v U.S.*, 204 U.S. 364, 51 L.Ed. 523, 27 S.Ct. 367.

⁵⁵ Usually the legislature alone has this power by virtue of constitutional provisions, *McPherson v State*, 174 Ind. 60, 90 N.E. 610; *Ex parte Smythe*, 56 Tex. Crim. 375, 120 S.W. 200; also see *Holden v James*, 11 Mass. 396.

⁵⁶ *Carozza v Federal Finance Co.*, 149 Md. 223, 131 Atl. 332, 43 A.L.R. 1. And see *infra*, Chapt. VIII, Special, Local and General Laws, §§ 79, 85.

⁵⁷ *State v Gerhart*, 145 Ind. 439, 44 N.E. 469; *Lyttle v May*, 49 Iowa 224; *People v Collins*, 3 Mich. 343; *Lammert v Lidwell*, 62 Mo. 188. " . . . no legislative act can be so framed as that it must derive its efficacy from a popular vote." *Buena Vista School Dist. v Board of Election Comrs. (Tenn.)* 116 S.W. (2) 1008.

⁵⁸ See § 21, *infra*.

statute should become effective as law.⁵⁹ There are, however, some cases which hold to the contrary.⁶⁰ But, as we shall hereafter see,⁶¹ local option laws, are generally upheld by the courts. Nevertheless, whether the legislature may make the effectiveness of a law depend upon the vote of the people of the whole state, in the absence of a constitutional provision for a referendum, presents a most interesting problem, at least, academically. The majority view is based upon the proposition that, while the exercise of this power by the people is not expressly prohibited by the constitution, it is forbidden by necessary and unavoidable implication. The legislature alone is clothed with the power of legislation. It has no power to make such a submission, nor have the people the power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. While the government of the state is democratic, it is a representative democracy, and in passing general laws, the people act through their chosen representatives in the legislature.⁶² On the other hand, the minority view, insists that the operation of a law may fairly be made to depend upon a future contingency, and that it makes no essential difference what may be the nature of the contingency,

⁵⁹ *People ex rel Thomson v Barnett*, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044; *State v Beneke*, 9 Iowa 203; *Brawner v Supervisors*, 141 Md. 586, 119 Atl. 250; *Opinion of Justices*, 160 Mass. 586, 36 N.E. 488, 23 L.R.A. 113; *State ex rel Pearson v Hayes*, 61 N.H. 264; *Bardley v Baxton*, 15 Bar. (N.Y.) 122; *State v Swisher*, 17 Tex. 441. See also apparently favoring majority view; *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543; *Re School Code*, 7 Boyce (Dela.) 406, 108 Atl. 39; *McPherson v State*, 174 Ind. 60, 90 N.E. 610; *Eckerson v Des Moines*, 137 Iowa 452, 115 N.W. 177; *Bradshaw v Lankford*, 73 Md. 428, 21 Atl. 66, 7 L.R.A. 682; *Owen v Baer*, 154 Mo. 434, 55 S.W. 644; *Kibbee v Lyons*, 118 Misc. 172, 192 N.Y. Supp. 696, aff'd 202 Ap. Div. 562, 195 N.Y. Supp. 563; *Fouts v Hood River*, 46 Ore. 592, 81 Pac. 370; *Parker v Commonwealth*, 6 Pa. 507; *Arthur v State*, 148 Tenn. 434, 256 S.W. 437; *Winters v Hughes*, 3 Utah 443, 24 Pac. 759; *Turner v Saxon (Wash.)* 20 Pac. 685; *State ex rel Brown v Copeland*, 3 R.I. 33. Of course, the final effectiveness of a general law cannot be left to the voters of one county. *Fritter v West (Tex.)* 65 S.W. (2) 414.

⁶⁰ *Hudspeth v Swayze*, 85 N.J.L. 592, 89 Atl. 780; *State v Scampini*, 77 Vt. 92, 59 Atl. 201; *Smith v Janesville*, 26 Wis. 291. See also apparently favoring minority view; *Caldwell v Barrett*, 73 Ga. 604; *Cain v Davie County*, 86 N.C. 8; *Cottrell v Lenior*, 173 N.C. 138, 91 S.E. 827; *Bull v Read*, 13 Gratt. (Va.) 78; *Rutter v Sullivan*, 25 W.Va. 427.

⁶¹ See §§ 20, 21 and 22, *infra*.

⁶² *Barto v Himrod*, 8 N.Y. 483. Also see cases under note 59, *supra*.

so long as it is a fair one, a moral and a legal one, and not opposed to sound policy, and is not idle or arbitrary.⁶³ And admitting that the constitution established a representative government and not a pure democracy, the question is whether it puts a limit upon the power of the legislature to pass laws. Since nothing in the constitution, expressly or impliedly, withholds from the legislature the power to pass a law and make it subject to rejection by the people, it is not forbidden by the Constitution.⁶⁴

§ 21. The Initiative and Referendum.⁶⁵—In a number of states, the people have reserved to themselves the right to propose laws and to enact them at the polls independently of the legislature as well as the right to require that most laws⁶⁶ be submitted to them for approval at the polls before becoming effective. These two rights are known as the initiative and referendum, respectively.⁶⁷ Through the instrumentalities provided for the exercise of these two rights, the people, as a co-ordinate legislative body,⁶⁸ with a power co-extensive⁶⁹ with that of the legislature, exercise legislative power. They exercise the same sovereignty that is exercised by the legislature,⁷⁰ and the laws thus passed by the people are of equal dignity with those passed by the legislature.⁷¹ Yet neither the initiative nor the referendum constitutes an unlawful delegation of legislative power, but, as we have already stated, each merely reserves such power to the people instead of conferring it upon them. Before the constitutional provision was adopted, the sovereign power rested in the people of the whole state, and

⁶³ *State v Parker*, 26 Vt. 357; also see cases under note 60, supra.

⁶⁴ *Opinion of Justices*, 160 Mass. 586, 36 N.E. 488, 23 L.R.A. 113.

⁶⁵ For a detailed treatment of the Initiative and Referendum, see Chapter VI, *infra*, §§ 47-67.

⁶⁶ These exceptions usually consist of those laws which are necessary for the immediate preservation of the public peace, health, safety, and for the support of the government and existing public institutions. See §§ 48 and 49, *infra*.

⁶⁷ See § 47, *infra*, for definitions of each.

⁶⁸ *State v Osborne*, 16 Ariz. 247, 143 Pac. 117; *State v Stewart*, 57 Mont. 144, 187 Pac. 641; *Baird v Burke County*, 53 N.D. 140, 205 N.W. 17; *State v Slusher*, 119 Ore. 141, 248 Pac. 358; *State v Polley*, 26 S.D. 5, 127 N.W. 848; *State v Howell*, 107 Wash. 167, 181 Pac. 920.

⁶⁹ *Ibid*.

⁷⁰ *State v Hinkle*, 156 Wash. 289, 286 Pac. 839.

⁷¹ *State v Erickson*, 75 Mont. 429, 244 Pac. 287.

the same is equally true after the adoption of the constitutional provision.⁷² Since it is a reservation to themselves of a part of the legislative power, and since such a provision in no manner conflicts with the law-making power of the legislature or prohibits the legislature from also enacting the same law as that desired by the people,⁷³ the guarantee in the federal constitution of a republican form of government to every state is not violated.⁷⁴ It should be remembered, however, that the people cannot by a law, initiated by them pursuant to their constitutional power of initiative and referendum, delegate their power as law makers to executive or administrative officers⁷⁵ any more than the legislature can so delegate its legislative powers.⁷⁶

§ 22. **Local Option.**—Local option laws, or statutes which submit to the voters of a county, city, or some other subdivision of the state, the question whether or not a statute enacted by the legislature shall be operative in such locality, or which provide that the statute shall take effect in such locality only after it has been approved by a majority of the voters thereof, do not constitute an unlawful delegation of legislative power to the people or the voters.⁷⁷ The principle upon which local option laws have been sustained, is that while the legislature cannot delegate its power to

⁷² *Hodges v Dowdy*, 104 Ark. 583, 149 S.W. 656.

⁷³ *State v Whisman*, 36 S.D. 260, 154 N.W. 707.

⁷⁴ *King v Reed*, 43 N.J.L. 186; *Smith v Janesville*, 26 Wis. 291.

⁷⁵ *Tillotson v Frohmiller*, 34 Ariz. 394, 271 Pac. 867.

⁷⁶ See § 15, *supra*.

⁷⁷ *Leger v Rice* (U.S.) 8 Phila. 167, Fed. Cas. No. 8,210; *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543; *People v McBride*, 234 Ill. 146, 84 N.E. 865; *McPherson v State*, 174 Ind. 60, 90 N.E. 610; *Commonwealth v Weller* (Ky.) 14 Bush. 218, 29 Am.Rep. 407; *Bradshaw v Lankford*, 73 Md. 428, 21 Atl. 66, 7 L.R.A. 682; *Stone v Charleston*, 114 Mass. 214; *Commissioners v Davis*, 102 Miss. 497, 59 So. 811; *Evers v Hudson*, 36 Mont. 135, 92 Pac. 465; *State ex rel Warner v Hoagland*, 51 N.J.L. 62, 16 Atl. 166; *People ex rel Cincinnati, W. & Z. R. Co. v Clinton County*, 1 Ohio St. 77; *McGonnell's License*, 209 Pa. 327, 58 Atl. 615; *State ex rel Crothers v Barber*, 19 S.D. 1; *Peterson v Peterson*, 42 Utah 270, 130 Pac. 241; *State v Parker*, 26 Vt. 357; *Rutter v Sullivan*, 25 W.Va. 427; *Williams v Sawyer County*, 140 Wis. 634, 123 N.W. 248. See also Annotations in 1 L.R.A. (n.s.) 483 and 15 L.R.A. (n.s.) 942.

make a law, it can make a law which leaves it to specified subdivisions of the state to determine some fact or state of facts upon which the operation of the law may depend.⁷⁸ Since the legislature has the power to pass a law whose effectiveness is made dependent upon the happening of a contingency or future event,⁷⁹ it may make such contingency the affirmative vote of the people effected by the law in a given locality.⁸⁰ But a few cases go so far as to hold local option laws invalid.⁸¹ This view seems to be founded on the proposition that to permit the people to legislate by the ballot box, is to introduce pure democracy into our government, thus subverting the constitution of the state and that provision of the federal constitution which guarantees a republican form of government.⁸² The further contention is made that a law, in order to be valid, must leave the legislature complete, not in the sense that it must go into effect at once, but in that it must at its birth bear the impress of sovereignty and speak the sovereign will.⁸³ It is also stated that those decisions which uphold local option laws on the theory that the vote is the effect of the law and not the law, merely play on words, since it is clear that if all laws were made dependent upon such a contingency, representative government would be destroyed,⁸⁴ and that, after all, there is no difference in principle between making the contingency the favorable vote of the whole state and making it that of a subdivision of the state.⁸⁵

§ 23. Delegation of Legislative Power to the Judiciary.—Since the judiciary is one of the three separate departments of government,⁸⁶ the legislature may not delegate powers legislative in char-

⁷⁸ *Re Rahrer*, 140 U.S. 545, 35 L.Ed. 572, 11 S.Ct. 865.

⁷⁹ See §§ 16 and 19, *supra*.

⁸⁰ *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543; *People v McBride*, 234 Ill. 146, 84 N.E. 865; *Re O'Brien*, 29 Mont. 530, 75 Pac. 146.

⁸¹ *Rice v Foster*, 4 Harr. (Del.) 479; *Wright v Cunningham*, 115 Tenn. 445, 91 S.W. 293.

⁸² *Rice v Foster*, 4 Harr. (Del.) 479.

⁸³ *Wright v Cunningham*, 115 Tenn. 445, 91 S.W. 293.

⁸⁴ *Wright v Cunningham*, 115 Tenn. 445, 91 S.W. 293.

⁸⁵ *Wright v Cunningham*, 115 Tenn. 445, 91 S.W. 293.

⁸⁶ See § 8, *supra*.

acter to it,⁸⁷ except where authorized by the constitution.⁸⁸ Thus, it cannot delegate to the courts the power to legislate—that is the power to make,⁸⁹ suspend⁹⁰ or to revoke laws,⁹¹ or to determine when a statute shall go into effect.⁹² But the legislature may delegate to the judiciary the power to exercise discretion in,⁹³ and to prescribe rules for the administration of justice.⁹⁴ It may

⁸⁷ *Peters v U.S.*, 20 Fed. (2) 741; *U.S. v Louisville R. Co.*, 176 Fed. 942; *State v Skinner*, 20 Ala. Ap. 204, 101 So. 327; *State v Howard*, 107 Kan. 423, 191 Pac. 585; *Jernigan v Madisonville*, 102 Ky. 313, 43 S.W. 448; *Boston v Chelsea*, 212 Mass. 127, 98 N.E. 620; *Brenke v Belle Plains*, 105 Minn. 84, 117 N.W. 157; *State ex rel Orr v Kearns*, 304 Mo. 685, 264 S.W. 775; *State v Offell*, 74 Neb. 669, 105 N.W. 1098; *King v State*, 87 Tenn. 304, 10 S.W. 509; *Ex parte Smythe*, 56 Tex. Crim. 375, 120 S.W. 200; *State v Skagit*, 42 Wash. 491, 85 Pac. 264; *Sutherland v Miller*, 79 W.Va. 796, 91 S.E. 993; *Minneapolis, etc., R. Co. v State Rail. Comm.*, 136 Wis. 146, 116 N.W. 905. Thus, the rate-making power cannot be delegated to the courts. *State v Howatt*, 107 Kan. 423, 191 Pac. 585. But note *Nelson v First National Bank*, 42 Fed. (2) 49, that the state may clothe its courts with purely administrative powers.

⁸⁸ *Boone County v Town of Verona*, 190 Ky. 430, 227 S.W. 804.

⁸⁹ *Western Union Tel. Co. v Myatt*, 98 Fed. 335; *Henderson County v Wallace (Tenn.)* 116 S.W. (2) 1003 (power to increase salaries of county officials when deemed inadequate).

⁹⁰ *State v Field*, 17 Mo. 529; *Adams v State*, 56 Tex. Crim. 199, 120 S.W. 208.

⁹¹ *Shepherd v Wheeling*, 30 Va. 479, 4 S.E. 635; *State v Pavelich*, 153 Wash. 379, 279 Pac. 1102.

⁹² *State v Young*, 29 Minn. 474, 9 N.W. 737.

⁹³ See 39 Yale L.J. 413.

⁹⁴ *Ohio v Dollison*, 194 U.S. 445, 48 L.Ed. 1062, 24 S.Ct. 703; *Dickey v Hurlburt*, 5 Cal. 343; *People v Crissman*, 41 Cal. 450, 92 Pac. 949; *New York Ry. Co.'s Appeal*, 62 Conn. 527, 26 Atl. 122; *Martinez v Ward*, 19 Fla. 175; *Phinizy v Eve*, 108 Ga. 360, 33 S.E. 1007; *Morton v Pusey*, 239 Ill. 26, 86 N.E. 601; *Clay County v McGregor*, 171 Ind. 634, 87 N.E. 1; *Esbridge v Emporia*, 63 Kan. 368, 65 Pac. 694; *Lewis v Brandenburg*, 105 Ky. 14, 47 S.W. 862; *McCrea v Roberts*, 89 Md. 238, 43 Atl. 39, 44 L.R.A. 485; *In re Janvrin*, 174 Mass. 541, 55 N.E. 381; *State v Crosby*, 92 Minn. 176, 99 N.W. 636; *State v Higgins*, 125 Mo. 364, 28 S.W. 638; *O'Neil v Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. 283; *Richardson County Drain. Dist. v Richardson County*, 86 Neb. 355, 125 N.W. 796; *Hoboken v O'Neill*, 74 N.J.L. 57, 64 Atl. 981; *Matter of Lackawanna*, 158 Ap. Div. 263, 143 N.Y.S. 198; *Assur v Cincinnati*, 88 Ohio St. 181, *O'Kelley v. Terr.*, 1 Ore. 51; *Scott v Marley*, 124 Tenn. 388, 137 S.W. 492; *Texas R. Comm. v Weld*, 96 Tex. 394, 73 S.W. 529; *Young v Salt Lake City*, 24 Utah 321, 67 Pac. 1066; *Bolling v Lersner*, 26 Gratt. (Va.) 36; *Haigh v Bell*, 41 W.Va. 19, 23 S.E. 661, 31 L.R.A. 131. See also discussion in §§ 13 and 14, *supra*, with reference to the power of the courts to adopt their own rules of procedure.

also delegate to the courts the power to determine from the evidence, the existence of certain facts on which the operation of the statute depends.⁹⁵

§ 24. Delegation of Legislative Power to Political Subdivisions—Counties, Municipal Corporations, etc.—Under the American system of government, it is a cardinal principle that local affairs shall be managed and controlled by local authorities and general affairs by the central authority. It has been an immemorial practice for the central authority or general government to vest some portion of the policy power in subordinate governmental branches or municipal corporations for the local self-government of such branches or units.⁹⁶ Legislation delegating such power is not regarded as a transfer of general legislative power but as the grant of authority to prescribe local regulations in accord with immemorial practice, subject to the interposition of the superior authority in cases of necessity.⁹⁷ This does not violate the inhibition against the delegation of legislative power. In fact, it has never been held to intrench upon the rule of *delegatus non potest delegare*.⁹⁸ As a

⁹⁵ *Udall v Severn* (Ariz.) 79 Pac. (2) 347; *In re Boston*, 221 Mass. 468, 109 N.E. 389; *Yazoo County v Grable*, 111 Miss. 893, 72 So. 777; *Matter of Lackawanna*, 158 Ap. Div. 263, 143 N.Y.S. 198; *In re Fullmer*, 33 Utah 43, 92 Pac. 768. Also see 39 Yale L.J. 413. And note § 16, supra, for delegation of the power to ascertain facts to executive and administrative officers. For additional treatment of the above section, see 11 Am.Jur. §§ 225-228.

⁹⁶ *Stoutenburgh v Hennick*, 129 U.S. 141, 32 L.Ed. 637, 9 S.Ct. 256; *New Orleans Waterworks Co. v New Orleans*, 164 U.S. 471, 41 L.Ed. 518, 17 S.Ct. 161; *Maricopa County Municipal Water Con. Dist. v La Prade* (Ariz.) 40 Pac. (2) 94; *Wilson v Compton Bond & Mtg. Co.*, 103 Ark. 452, 146 So. 110; *Jacksonville v Bowden*, 67 Fla. 181, 64 So. 769; *Chicago v Stratton*, 162 Ill. 494, 44 N.E. 853, 35 L.R.A. 84; *Sarlls v State*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; *Lytle v May*, 49 Iowa 224; *Rossberg v State*, 111 Md. 394, 74 Atl. 518; *Sluder v St. L. Transit Co.*, 189 Mo. 107, 88 S.W. 648; *Butte v Mont. Ind. Tel. Co.*, 50 Mont. 574, 148 Pac. 384; *Ex parte Sloan*, 47 Nev. 109, 217 Pac. 233; *State ex rel Rush v Budge*, 14 N.D. 532, 105 N.W. 724; *Ex parte Brewer*, 68 Tex. Crim. 387, 152 S.W. 1068; *State v Briggs*, 46 Utah 288, 146 Pac. 261; *Danville v Hatcher*, 101 Va. 523, 44 S.E. 723. This exception rests on historical grounds. *Fox v McDonald*, 101 Ala. 51, 13 So. 416. But Congress cannot delegate legislative power to the states, *Knickerbocker Ice Co. v Stewart*, 253 U.S. 149, although such power can be delegated to a territory. *Dorr v U.S.*, 195 U.S. 138, 49 L.Ed. 128, 24 S.Ct. 801.

⁹⁷ *Ibid.*

⁹⁸ *Stoutenburgh v Hennick*, 129 U.S. 141, 32 L.Ed. 637, 9 S.Ct. 256; *People v Barnett*, 344 Ill. 62, 176 N.E. 108.

result, the state legislature may empower a municipal corporation⁹⁹ to make police regulations concerning local matters,¹⁰⁰ to regulate public utilities locally,¹⁰¹ to make regulations for the local public health and safety,¹⁰² and to levy taxes for local purposes.¹⁰³ The delegation of such power by the legislature to a municipal corporation does not divest the state of its sovereign right to exercise the power itself or to take it away from the local unit at any time it sees fit.¹⁰⁴ And the same restrictions which rest upon the state legislature regarding the delegation of legislative power and functions, are also imposed on the political subdivisions or municipal corporation as to the powers granted to them by the legislature.¹⁰⁵

§ 25. Delegation of Legislative Powers to Private Persons or to Corporations.—An examination of the authorities indicates considerable confusion and uncertainty as to what powers may be delegated to private persons, associations, and corporations, and as to the extent the operation of a statute may be made dependent upon the action of such persons or organizations. It may be stated as a general rule that the legislature cannot delegate to private

⁹⁹ *State v City of Mankata*, 117 Minn. 458, 136 N.W. 264; *State v Ure*, 91 Neb. 31, 135 N.W. 224 (commission form); and note, 28 Mich. L.Rev. 381 (home rule).

¹⁰⁰ *Ex parte Brewer*, 68 Tex. Crim. 387, 152 S.W. 1068; *Wisemer v Close*, 183 N.Y. 353; *Danville v Hatcher*, 101 Va. 523, 44 S.E. 723; *Zucht v King*, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24; *In re Opinion of Justices*, 286 Mass. 611, 191 N.E. 33.

¹⁰¹ *Home Telegraph & Telephone Co. v Los Angeles*, 211 U.S. 265, 53 L.Ed. 176, 29 S.Ct. 50; *New York v Davis (C.C.A.)* 7 Fed. (2) 566; *Dobson v Mescall*, 199 N.Y.S. 800, 205 Ap.Div. 265; *Butte v Montana Ind. Tel. Co.*, 50 Mont. 574, 148 Pac. 384.

¹⁰² *Community Chautauquas, Inc., v Caverly (D.C.-Vt.)* 244 Fed. 893; *City of New York v Davis (C.C.A.)* 7 Fed. 566; *People v Sholem*, 294 Ill. 204, 128 N.E. 377; *Homzal v City of San Antonio (Tex.)* 221 S.W. 237.

¹⁰³ *U.S. v New Orleans*, 98 U.S. 381, 25 L.Ed. 225.

¹⁰⁴ *Chicago v Hotel Co.*, 248 Ill. 264, 93 N.E. 753; also see *Central Pac. Ry. Co. v Costa*, 84 Calif. Ap. 577, 258 Pac. 991 (county).

¹⁰⁵ *Chicago v Stratton*, 162 Ill. 494, 44 N.E. 853, 35 L.R.A. 84; *People ex rel Lockwood v Grand Trunk R. Co.*, 232 Ill. 292, 83 N.E. 839.

persons,¹⁰⁶ or to private corporations,¹⁰⁷ the power to make laws. But this rule does not prohibit the enactment of a statute, the operation of which is made dependent to some extent on the action of individuals¹⁰⁸ or private corporations.¹⁰⁹ It may authorize them in an administrative capacity to carry a law into effect,¹¹⁰ or to select or to appoint officers for that purpose,¹¹¹ and to authorize them, or the selected officers, to make reasonable rules and regulations for the conduct of their business.¹¹² Thus, the power may be vested in private persons or corporations to adopt rules and regulations pertaining to the wearing of lodge insignia,¹¹³ to make

¹⁰⁶ *Schechter v U.S.*, 295 U.S. 495, 79 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947; *Illinois Power & Light Corp. v City of Centralia* (D.C.-Ill.) 11 Fed. Supp. 874; *Banaz v Smith*, 133 Cal. 102, 65 Pac. 309; *Hutchinson v Leimbach*, 68 Kan. 37, 74 Pac. 598, 63 L.R.A. 630; *Ohio R. Co. v Todd* (Ky.) 15 S.W. 56; *People v Bennett*, 29 Mich. 451; *Elliott v Wille*, 112 Neb. 78, 200 N.W. 347, rev. 112 Neb. 861, 198 N.W. 861; *Morton v Holes*, 17 N.D. 154, 115 N.W. 256; *Van Winkle v Fred Meyer, Inc. (Ore.)* 49 Pac. (2) 1140; *Middleton v Texas Power Co. (Tex.)* 178 S.W. 956; *Winters v Hughes*, 3 Utah 443, 24 Pac. 759; *Gibson Auto Co. v Finnegan (Wis.)* 259 N.W. 420; also see *Retail Solid Fuel Ind. v Reisenberg*, 129 Ohio St. 679, 196 N.E. 424, involving industrial associations.

¹⁰⁷ *Seneca County Bank v Lamb*, 26 Barb. (N.Y.) 595; *Ex parte Maynard*, 101 Tex. Civ. Rep. 256, 275 S.W. 1070. An illustration of this rule may be found in *Arkansas-Louisiana Gas Co. v Texarkana*, 97 Fed. (2) 5, in which the clause of a gas franchise ordinance which provided that if the gas company should be finally compelled to, or should voluntarily change its rates, less than the rates granted by the ordinance, the lessened rates should be applicable, was held invalid as an attempt to delegate the rate making power to the company.

¹⁰⁸ *State v New Haven Co.*, 43 Conn. 351; *Hill v Johnson County*, 82 Kan. 813, 109 Pac. 163; *Walton v Greenwood*, 60 Me. 356; *St. Paul Gaslight Co. v Sandstone*, 73 Minn. 225, 75 N.W. 1050; *State ex rel Standard Oil Co. v Combs*, 129 Ohio St. 251, 194 N.E. 875.

¹⁰⁹ *In re Slaughter House Cases (U.S.)* 16 Wall. 36, 21 L.Ed. 394; *Overshiner v State*, 156 Ind. 187, 59 N.E. 468, 51 L.R.A. 748; *Granby Mining Co. v Richards*, 95 Mo. 106, 8 S.W. 246; *Fox v Mohawk Soc.*, 165 N.Y. 517, 59 N.E. 353, 51 L.R.A. 681; *Morrison v State*, 116 Tenn. 534, 95 S.W. 494. So a statute imposing on corporations capital stock and excess profit taxes based on the value of their stock as declared by them is not invalid as a grant of legislative power. *Telephone Co. v U.S.*, 23 Fed. Sup. 471.

¹¹⁰ *American Society for P.C.A. v City of New York*, 199 N.Y.S. 728, 205 Ap.Div. 335; *Day v St. Augustine*, 104 Fla. 261, 139 So. 880 (power to impose and collect bridge tolls).

¹¹¹ See Const. L., 12 C.J., p. 843, § 328.

¹¹² See cases under note 109, *supra*.

¹¹³ *State v Holland*, 37 Mont. 393, 96 Pac. 719.

rules for the operation of mines,¹¹⁴ or regulations regarding the sale and use of tickets of public carriers,¹¹⁵ and the like.¹¹⁶

§ 26. Fields in Which the Delegation of Legislative Power Predominates.—It would obviously be impossible, and perhaps not strictly within the proper purview of this treatise, to go into the various fields where the delegation of legislative power has played its most important roles. The reports abound in decisions pertaining to the delegation of powers, and many of the fields have been treated with varying degrees of thoroughness by eminent authorities. The fields perhaps in which the delegation of legislative power has been most frequently involved are as follows: public service companies, motor vehicles, tariff, bridges, health and sanitation, wages, hours and conditions of work, food and drugs, building and zoning regulations, licensing and regulating professions, banks and corporations, insurance companies, taxation, elections, civil service, aircraft, radio, farm aid, oil and gas, workmen's compensation, emergency acts and moratorium laws.¹¹⁷

§ 27. Some Present Day Trends.—Even in a democratic state there is, and of necessity must be, considerable regulation of human affairs by independent bodies to whom power is delegated by the legislature. This has been so in the United States. And the courts have shown considerable liberality in upholding delegations of power which strictly might have easily been regarded as unlawful delegations. In fact, until the rendition of the opinion in *Schechter v United States*,¹¹⁸ apparently, never before has the United States Supreme Court held a delegation of legislative power invalid.

¹¹⁴*Plymouth Coal Co. v Pennsylvania*, 232 U.S. 531, 58 L.Ed. 713, 34 S.Ct. 359; *Richards v Fleming Coal Co.*, 104 Kan. 330, 179 Pac. 380; *Anderson v Greenville Coal Co.*, 205 Ky. 111, 265 S.W. 472; *Gima v Hudson Coal Co.*, 310 Pa. 480, 165 Atl. 850; *Koppala v State*, 15 Wyo. 398, 89 Pac. 576, 93 Pac. 662.

¹¹⁵*Whaley v State*, 163 Ala. 152, 52 So. 941; *Samuelson v State*, 116 Tenn. 470, 95 S.W. 1012; *Re O'Neil*, 41 Wash. 174, 83 Pac. 104. But see *Jannin v State*, 42 Tex. Crim. 631, 51 S.W. 1126, 62 S.W. 821.

¹¹⁶*Morrison v State*, 116 Tenn. 534, 95 S.W. 494. On power delegated to lawyers under integrated bar acts, see 32 Colo. L.Rev. 80.

¹¹⁷For a good general treatment of these matters, see Annotation in 79 L.Ed. 509-582.

¹¹⁸295 U.S. 495, 79 L.Ed. 1670, 55 S.Ct. 837, 97 A.L.R. 947.

A complex society has undoubtedly increased the necessity for the delegation of power to the executive department, and the courts have recognized the necessity for such delegation in order that our laws might be more efficiently and expeditiously executed. Moreover, the necessity for co-operation by the executive and legislative departments has also resulted in the delegation of legislative power. And sometimes the existence of an emergency—the need for immediate action—has been urged in justification of such a delegation.

Whether it be considered desirable or not, there is, and has been for some time, a trend toward vesting more power in the executive department of government. The real problem is to determine the proper spheres of each of the three departments of government. Since the line which separates the powers and functions of one department from another are not clearly expressed or accurately defined,¹¹⁹ men have honestly differed and doubtless will continue to differ, as to the nature and extent of the limitations and prohibitions of the various departments. It is inevitable that so long as the powers of each department depend upon interpretation, the interpreters, influenced by interest, ideals, faction, or the desire to meet a specific situation effectively, perhaps unconsciously, will reach different conclusions.

After all, perhaps the friction between the different departments of government is not wholly evil. As Mr. Justice Brandeis said in a famous dissenting opinion,¹²⁰ “The doctrine of separation of powers was adopted . . . not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incidental to the distribution of government powers between three departments, to save the people from autocracy.” But, as to those powers which are not exclusively committed to any one department, there should be such generous co-operation as will tend to keep the government responsive to the needs of society.¹²¹

¹¹⁹ Dwarris, *Statutes and Constitutions*, Ch. III, pp. 85-86.

¹²⁰ *Myers v United States*, 272 U.S. 52, 71 L.Ed. 160, 47 S.Ct. 21.

¹²¹ *In re Constitutionality of Statute*, 204 Wis. 501, 236 N.W. 717. Also see *White County v Gwin*, 136 Ind. 562, 36 N.E. 237, 22 L.R.A. 402, that one department cannot ignore or treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory.

CHAPTER IV

THE LEGISLATURE: ITS SESSIONS, ORGANIZATION, AND PROCEDURE, GENERALLY

- § 28. The Legislature, In General.
- § 29. Regular Sessions.
- § 30. Special or Extraordinary Sessions.
- § 31. Presiding Officers.
- § 32. The Caucus.
- § 33. Rules.
- § 34. Committees.

§ 28. **The Legislature, In General.**—The word “legislature” has been variously defined. But so far as we are concerned, a definition as suitable as any, if one is needed, is that which defines it as that representative body in a state which is vested with the power to make, alter and repeal laws,¹ or, in other words, to exercise the legislative power.² And as we have already indicated,³ the legislative power of the federal government is vested in congress and the legislative power of the states in the several state legislatures. These legislative bodies are creatures of the respective constitutions, for they all owe their existence to constitutional provisions. Usually, they consist of two houses or branches,⁴ one commonly called or known as the senate and the other as the house of representatives, or the lower house, with the former being the smaller numerically and chosen from larger districts. The members of each are elected by the qualified voters in designated dis-

¹ State v Hildebrandt, 94 Ohio St. 154, 114 N.E. 55. See also Decher v Secretary of State, 209 Mich. 565, 177 N.W. 388.

² For definition of legislative power, see § 11, supra.

³ See §§ 5 and 6, supra.

⁴ A unicameral legislature has been recently created in Nebraska. But, contrary to popular impression, this is not the first experiment with a unicameral legislature in this country. The first constitution of Virginia provided for a single legislative body, and, of the original thirteen states, Pennsylvania and Georgia both had legislatures with a single house. Cooley—Const. Lim., Ch. vii, p. 268. For arguments in favor of a division of the legislative department, see Story on Const., § 545, 1 Kent 208, and Federalist No. 22. Also see for further references regarding the unicameral legislature, § 6, note 39, supra.

tricts or political subdivisions, and the size of the district, as well as the number of members from such districts, will ordinarily be made to depend upon population. And the qualifications for the members of the legislature are, as a general rule, fixed by constitutional provisions.⁵ But before any law can be enacted, it is essential that there be a legal legislature⁶ lawfully convened.⁷ And its powers, as a general rule, are also prescribed by the constitution.⁸ Still, it is not necessary that each house have the same or possess identical powers. In fact, one may be clothed with powers not conferred upon the other;⁹ yet both houses, so far as legislation is concerned, are of equal importance;¹⁰ each is an indispensable part of a legal legislature.¹¹ As a result, legislation en-

⁵ See Holcombe, A. N. (2nd Ed.) *State Governments in U.S.*, 249.

⁶ *State v Francis*, 26 Kan. 724; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 19 L.R.A. 519; *State v Judge*, 29 La. Ann. 223. But it is possible to have a *de facto* legislature where the members are elected under an unconstitutional apportionment. *Everglades Drainage League v Napoleon Drainage Dist.*, 253 Fed. 246, appeal dismissed, 251 U.S. 567, 64 L.Ed. 418, 40 S.Ct. 219; *Hughes v Felton*, 11 Colo. 489, 19 Pac. 444. Similarly, the validity of a law is not affected by the failure to reapportion members. *People v Clardy*, 334 Ill. 160, 165 N.E. 638. Nor will the action of the senate in passing a bill before the lower house elects a speaker, fatally affect the validity of the statute so passed. *Forrester v City of Memphis*, 159 Tenn. 16, 15 S.W. (2) 739.

⁷ *Macon R. Co. v Little*, 45 Ga. 370; *People v Hatch*, 33 Ill. 9; *Tennant's Case*, 3 Neb. 409.

⁸ *Stern v Council of City*, 25 Cal. Ap. 685, 145 Pac. 167; *Ingard v Barker*, 27 Idaho 124, 147 Pac. 293; *State v Merchants Exch.*, 269 Mo. 346, 190 S.W. 903, aff'd 248 U.S. 365, 63 L.Ed. 300, 39 S.Ct. 114; *Hilger v Moore*, 56 Mont. 146, 182 Pac. 477; *Matter of McAneny*, 232 N.Y. 377, 134 N.E. 187; *Korgegay v City*, 180 N.C. 441, 105 S.E. 187; *State v Anderson*, 18 N.D. 149, 118 N.W. 22; *Duffy v Cooke*, 21 Pa. Dist. 613; *Wright v Cunningham*, 115 Tenn. 445, 91 S.W. 293; *Comm. v Staunton*, 134 Va. 291, 114 S.E. 600.

⁹ See § 35, *infra*. And see *Brown v Brancato*, 321 Pa. 54, 184 Atl. 89, that a legislative investigating committee cannot be appointed by one house to act after adjournment *sine die* of the General Assembly. Either house may, however, appoint such a committee, without concurrence of the other, to act during the session. *Ex parte Caldwell*, 61 W.Va. 49, 55 S.E. 910. Also see 84 U. of Pa. L. Rev. 1029 (1936).

¹⁰ *Cooley—Const. Lim.*, Ch. vi.

¹¹ *Brown v Brancato*, 321 Pa. 54, 184 Atl. 89. Before a bill becomes a law, it must be legally passed by both houses. *Volusia v State*, 98 Fla. 1166, 125 So. 375, 125 So. 813.

acted by both houses is paramount to independent action by either.¹²

§ 29. **Regular Sessions.**—The constitution¹³ will usually provide for regular sessions of the legislature, generally annually or bi-annually, although statutes may be used for this same purpose. Such sessions must be held at the time specified, and no call or proclamation is necessary or needed.¹⁴ Sometimes the constitution will also fix the length of the regular session,¹⁵ or make provision for its extension if more time is desired.¹⁶ But in the absence of any provision limiting the duration of the session, it could continue indefinitely. On the other hand, the regular session may be adjourned at any time. And the power of the legislature at the regular session is practically unlimited so far as matters upon which it may legislate are concerned.^{16a}

¹² State ex rel v Poindexter, 48 N.D. 135, 183 N.W. 852. And see § 3, supra, for discussion regarding resolutions.

¹³ For provisions in Federal Constitution with reference to regular sessions of Congress, see U.S. Const. Art. 1, § 4, and 20th amendment, § 2. The constitution of California makes the following provision: "The sessions of the legislature shall be bi-ennial, unless the governor shall, in the interim, convene the legislature, by proclamation, in extraordinary session. All sessions, other than extraordinary, shall commence at 12 M., on the first Monday after the first day of January next succeeding the election of its members, and shall continue in session for a period not exceeding thirty days thereafter; whereupon a recess of both houses must be taken for not less than thirty days. On the reassembling of the legislature, no bill shall be introduced in either house without the consent of three-fourths of the members thereof, nor shall more than two bills be introduced by any one member after such reassembling." Const. Calif. 1879, Art. IV, § 2.

¹⁴ State ex rel Cunningham v Davis (Fla.) 166 So. 289.

¹⁵ *Bunger v State*, 146 Ga. 672, 92 S.E. 72 (after the expiration of such time, the legislature cannot validly act). Also see *ibid*, note 14.

¹⁶ See *Speed & Worthington v Crawford* (Ky.) 3 Metc. 207. And in calculating time, only the actual working days on which the legislature sets, excluding Sundays, are to be counted. *Sayre v Pollard*, 77 Ala. 608; see also *Cheyney v Smith*, 3 Ariz. 143, 23 Pac. 680. *Contra*: *White v Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L.R.A. 66. And note *State ex rel Cunningham v Davis* (Fla.) 166 So. 289, that the constitutional limitation of sixty days for the regular sessions, does not prevent the legislature from holding over in order to perform non-discretionary legislative duties, such as the keeping of journals, signing in open session of bills passed during such period, and the presentation of them to the executive. The legislature is bound to perform such duties before it can constitutionally adjourn *sine die*.

^{16a} *Smith v Chase*, 91 Fla. 1044, 109 So. 94.

§ 30. **Special or Extraordinary Sessions.**—The governor, or chief executive, by virtue of constitutional provisions is vested with the discretionary power to call special sessions of the legislature at any time he believes circumstances warrant or necessitate.¹⁷ He alone can exercise this discretion,¹⁸ and only by constitutional provision or amendment can the power be taken from him.¹⁹ Nor is his action subject to judicial review.²⁰

In some states, the power of the legislature to enact laws at a special session is limited by constitutional provisions,²¹ although in the absence of such a provision, the legislative power is as extensive as it is at a regular session,²² and the legislature may accordingly enact any law which it could legally pass at a regular session.²³ These provisions limiting the power of the legislature when convened in special session generally provide that the chief executive, in his discretion, may confine the legislature to the consideration of certain specified subjects,²⁴ and as many or as few as he sees fit,²⁵ and his discretion is not subject to review.²⁶ He may make this limitation upon the legislative power either by proclama-

¹⁷ Special sessions of Congress may be called by the President by virtue of the U.S. Const. (Art. II, § 3), "on extraordinary occasions."

¹⁸ *People v Parker*, 3 Neb. 409. Also see note 56, A.L.R. 721, and *Williams v Guerre*, 182 La. 745, 162 So. 609. But note the requirement in the North Carolina Constitution: "The governor shall have power on extraordinary occasions, *by and with the advice of the council of state*, to convene the General Assembly in extra session by his proclamation, starting therein the purpose or purposes for which they are thus convened." Art. III, § 9.

¹⁹ *Simpson v Hill*, 128 Okla. 269, 263 Pac. 635, 56 A.L.R. 706.

²⁰ *Denver, etc., R. Co. v Moss*, 50 Colo. 282, 115 Pac. 696; *Bunger v State*, 146 Ga. 672, 92 S.E. 72; *Farrelly v Cole*, 60 Kan. 356, 56 Pac. 492, 44 L.R.A. 464; *Williams v Guerre*, 182 La. 745, 162 So. 609.

²¹ This apparently is true in Illinois, Michigan, Missouri, and Nevada. And since the confirmation of appointments of the governor is not legislation, such confirmations may be made by the senate, while in special session for another purpose. *People ex rel Knight v Blanding*, 63 Calif. 333.

²² *Long v State*, 58 Tex. Crim. 209, 127 S.W. 208; *State v Fair*, 35 Wash. 127, 76 Pac. 731. See also *Morford v Unger*, 8 Iowa 82; *Woessner v Bullock*, 176 Ind. 166, 93 N.E. 1057.

²³ *State v Majors*, 16 Kan. 440; *State v Fair*, 35 Wash. 127, 76 Pac. 731. Also see cases under note 22, *supra*.

²⁴ But unlike the governors of many states, the president cannot limit the special sessions of Congress to the consideration of any particular matter.

²⁵ *Common. v Liveright*, 308 Pa. 35, 161 Atl. 697.

²⁶ See cases under note 23, *supra*.

tion or call,²⁷ or by special message, or both,²⁸ according to the requirements of the constitutional provisions of the particular jurisdiction involved.²⁹ If the special message is used, it may be addressed to the respective branches separately.³⁰ And in communicating with the legislature, it is not necessary that he use any particular words, or subscribe to any particular form or manner,³¹ unless there be a constitutional or statutory requirement to the contrary.³² Nor need he state in his call or message the details of the legislation which he recommends for passage.³³ The details springing from the subject or subjects submitted are matters within the judgment and discretion of the legislature³⁴ and hence beyond the executive's control, except for his veto.³⁵ In fact, he need not recommend that any legislation be enacted.³⁶ Such a recommendation, if made, so far as the legislature is concerned, would be at best simply advisory.³⁷ And if a general object is described, the legislature may determine the manner in which it is to be carried

²⁷ See *Devereaux v Brownsville*, 29 Fed. 742; *Pinnacle Mining Co. v People*, 58 Colo. 86, 143 Pac. 837; *Fleming v Wengler*, 269 Mo. 366, 190 S.W. 875; *Howard v State*, 77 Tex. Crim. 185, 178 S.W. 506.

²⁸ *State v Wollen*, 128 Tenn. 456, 161 S.W. 1006.

²⁹ *State v Tippet*, 317 Mo. 319, 296 S.W. 132; *State v Dishman*, 64 Mont. 530, 210 Pac. 604; *State v Key*, 121 Okla. 64, 247 Pac. 656.

³⁰ *State ex rel Rice v Edwards* (Mo.) 241 S.W. 945; *Lanck v Reis*, 310 Mo. 184, 274 S.W. 827; *State v Key*, 121 Okla. 64, 247 Pac. 656.

³¹ *Foster v Graves*, 168 Ark. 1033, 275 S.W. 653; *Ex parte Seward*, 299 Mo. 385, 253 S.W. 356, 31 A.L.R. 665, err. dis., 264 U.S. 599, 68 L.Ed. 869, 44 S.Ct. 335; *State v Key*, 121 Okla. 64, 247 Pac. 656.

³² If required to be in writing, the requirement must be met. *Manor Casino v State* (Tex.) 34 S.W. 769.

³³ *In re Governor's Proclamation*, 19 Colo. 333, 35 Pac. 530; *State ex rel Porterie v Smith*, 184 La. 263, 166 So. 72; *Ex parte Davis*, 86 Tex. Crim. 168, 215 S.W. 341. See also *Smith v Refunding Board* (Ark.) 83 S.W. (2) 76; *Denver R. Co. v Moss*, 50 Colo. 282, 115 Pac. 696; *State v Clancy*, 30 Mont. 529, 77 Pac. 312.

³⁴ See cases under note 33, *ibid.*

³⁵ *Ex parte Davis*, 86 Tex. Crim. 168, 215 S.W. 341. Also see § 44, *infra*, for treatment of the veto power.

³⁶ *State v Key*, 121 Okla. 64, 247 Pac. 656.

³⁷ *State Note. Board v Atty. Gen.* (Ark.) 54 S.W. (2) 696; *Pierson v Hendricksen* (Mont.) 38 Pac. (2) 991.

out.³⁸ But where the executive is required to specify the purpose for which the special session is convened, he must state specifically or with some particularity the subject matter which is to be considered, or otherwise no power is conferred upon the legislature.³⁹ So also, if the language setting forth the subject matter to be considered is so broad that in reality the legislature is left to choose the subject matter, no legislation is competent, since no legislation has been named.⁴⁰ A call for a special session may be revoked at the governor's will.⁴¹ Or after the issuance of a proclamation, and before the legislature convenes, he may issue a supplementary or new proclamation thereby submitting other subjects to the legislature for its consideration.⁴²

From the foregoing discussion, it is apparent that the limitation of the legislative power is quite extensive. Nevertheless, constitutional provisions granting the executive this power over the legislature in special session, are and should be strictly construed.⁴³ They should not be given an effect which will prevent the passage of legislation not clearly prohibited,⁴⁴ although the provisions are primarily intended to give the public notice that certain subjects are before the legislature for consideration.⁴⁵ They are also man-

³⁸ *Baker v Kaiser*, 126 Fed. 317, 61 C.C.A. 303; *Timmer v Talbot*, 13 Fed. Sup. 666; *Board of Regents v Sullivan* (Ariz.) 42 Pac. (2) 619; *Parsons v People*, 32 Colo. 221, 76 Pac. 666; *State ex rel Porterie v Smith*, 184 La. 263, 166 So. 72; *Mitchell v Franklin Co.* (Tenn.) 3 Humphr. 456; *Stockard v Reid*, 57 Tex. Civ. Ap. 126, 121 S.W. 1144; *State v Fair*, 35 Wash. 127, 76 Pac. 731.

³⁹ *Denver R. Co. v Moss*, 50 Colo. 282, 115 Pac. 696; *State ex rel Byrne v Edwards* (Mo.) 241 S.W. 951; *Common. v Liveright*, 303 Pa. 35, 161 Atl. 697; *Long v State*, 58 Tex. Crim. 209, 127 S.W. 208.

⁴⁰ *Denver R. Co. v Moss*, 50 Colo. 282, 115 Pac. 696; *State ex rel Rice v Edwards* (Mo.) 241 S.W. 945.

⁴¹ *People v Parker*, 3 Neb. 409. And the revocation of a proclamation by the executive or his successor leaves the legislature without authority to act. *Tennant's Case*, 3 Neb. 409.

⁴² *Foster v Graves*, 168 Ark. 1033, 275 S.W. 652; *In re Pittsburgh's Petition*, 217 Pa. 227, 66 Atl. 348, aff. 207 U. S. 161, 52 L.Ed. 151, 28 S.Ct. 40. But see *Sims v Weldon*, 165 Ark. 13, 263 S.W. 42.

⁴³ *State v Woolem*, 123 Tenn. 456, 161 S.W. 1006; *Long v State*, 58 Tex. Crim. 209, 127 S.W. 208.

⁴⁴ See cases under note 43, *ibid*.

⁴⁵ *Richmond v Lay*, 261 Ky. 138, 87 S.W. (2) 134; *Smith v Curran*, 267 Mich. 413, 255 N.W. 276, 94 A.L.R. 766; *Fayette County v County Commissioners*, 18 Pa. Dist. 217.

datory,⁴⁶ and any act enacted by the legislature outside the subjects specified by the governor, will be void,⁴⁷ even though it may be approved by him after its passage.⁴⁸ Nor can the executive dictate the legislation which may be enacted on the subjects submitted by him for legislative consideration at the special session,⁴⁹ or restrict the legislature to the consideration of a particular bill.⁵⁰ In fact, the legislature may pass any law it desires on any of the subjects which have been presented to it for consideration.⁵¹ But in many cases, it is difficult to determine whether a particular enactment is germane to, or falls within the scope of the governor's call or message.⁵² If, however, the legislation is incidental or

⁴⁶ *State v Pugh*, 31 Ariz. 317, 252 Pac. 1018; *Sims v Weldon*, 165 Ark. 13, 263 S.W. 42; *Jones v State*, 151 Ga. 502, 107 S.E. 765; *State ex rel Price v Edwards (Mo.)* 241 S.W. 945; *State ex rel Byrne v Edwards (Mo.)* 241 S.W. 951; *State v Key*, 121 Okla. 64, 247 Pac. 656; *In re Pittsburgh's Petition*, 217 Pa. 227, 66 Atl. 348, *aff'd* 207 U.S. 161, 52 L.Ed. 151, 28 S.Ct. 40; *Long v State*, 58 Tex. Crim. 209, 127 S.W. 208; *State Road Commission v West Virginia Bridge Comm. (W.Va.)* 166 S.E. 11.

⁴⁷ *Neilson v Chicago B. & Q. R. Co.*, 187 Fed. 393, 109 C.C.A. 225; *McClintock v Phoenix*, 24 Ariz. 144, 207 Pac. 611; *Jones v State*, 154 Ark. 288, 242 S.W. 377; *Jones v State*, 151 Ga. 502, 107 S.E. 765; *Smith v Curran*, 268 Mich. 366, 256 N.W. 453; *Wells v Mo. Pac. R. Co.*, 110 Mo. 286, 19 S.W. 530; *State v City of St. Louis*, 318 Mo. 970, 2 S.W. (2) 713; *State v Adams*, 323 Mo. 729, 19 S.W. (2) 671; *Schuffelin v Warren*, 250 N.Y. 396, 165 N.E. 824; *State ex rel Och v Braden*, 125 Ohio St. 307, 181 N.E. 138; *Long v State*, 58 Tex. Crim. 209, 127 S.W. 208; *Bedford v Price*, 112 W.Va. 674, 116 S.E. 380; *State v Pugh*, 31 Ariz. 317, 252 Pac. 1018.

⁴⁸ *Jones v State*, 151 Ga. 502, 107 S.E. 765; *Wells v Mo. Pac. R. Co.*, 110 Mo. 286, 19 S.W. 530; *Long v State*, 58 Tex. Crim. 209, 127 S.W. 208. See also note, 21 Ann. Cas. 412; *Smith v Curran*, 268 Mich. 366, 256 N.W. 453; *State ex rel v Edwards (Mo.)* 241 S.W. 944.

⁴⁹ See *Sims v Weldon*, 165 Ark. 13, 263 S.W. 42; *State ex rel Braden*, 125 Ohio St. 307, 181 N.E. 138; *Common. v Liveright*, 308 Pa. 35, 161 Atl. 697; *In re Likins*, 223 Pa. 468, 72 Atl. 862.

⁵⁰ *Smith v Curran (Mich.)* 268 Mich. 366, 256 N.W. 453.

⁵¹ *State v Woolen*, 128 Tenn. 456, 161 S.W. 1006. And see *State Note Board v Atty. Gen. (Ark.)* 54 S.W. (2) 696, where the subjects specified in the governor's proclamation, could not be treated separately by the legislature.

⁵² For cases holding legislation within purview of governor's proclamation, see *Board of Regents v Sullivan (Ariz.)* 42 Pac. (2) 619 (to borrow money or accept grants), *Crawford County Levee Dist. v Cazart (Ark.)* 78 S.W. (2) 378 (redemption of land), *Talbott v Jones*, 258 Ky. 449, 80 S.W. (2) 566 (license fees).

germane to the subject or general purpose expressed by the governor, it comes within the purview of his proclamation or message.⁵³ For example, if the object of the governor's proclamation in calling a special session is to reduce the cost of government, a statute reducing the wages of public employees was justified.⁵⁴

On the other hand, an act not germane to the call⁵⁵ or the message⁵⁶ is not proper. Nevertheless, it should be remembered that legislation may be considered authorized by implication.⁵⁷ And in determining whether an enactment is germane to the subject, the entire proclamation or message should be considered,⁵⁸ and given a fair and reasonable construction,⁵⁹ in order to bring the enactment within its scope or meaning, if possible.⁶⁰ The

⁵³ *Devereaux v Brownsville*, 29 Fed. 742; *Pinnacle Mining Co. v People*, 58 Colo. 86, 143 Pac. 837; *Richmond v Lay*, 261 Ky. 138, 87 S.W. (2) 134; *Fleming v Wengler*, 269 Mo. 366, 190 S.W. 875; *State v Johnson* (Mo.) 55 S.W. (2) 967; *State v Braden*, 125 Ohio St. 307, 181 N.E. 138; *Howard v State*, 77 Tex. Crim. 185, 178 S.W. 506. For other cases, see 59 C.J. § 22, note 51.

⁵⁴ *Carver v City of Charleston* (W. Va.) 169 S.E. 521.

⁵⁵ *Neilson v Chicago B. & Q. R. Co.*, 187 Fed. 393, 109 C.C.A. 225; *In re Opinion of Justices* (Ala.) 166 So. 710; *State v City of St. Louis*, 318 Mo. 970, 2 S.W. (2) 713; *Schuffelin v Warren*, 250 N.Y. 396, 165 N.E. 824; *Pierson v Hendricksen* (Mont.) 38 Pac. (2) 991. For other cases, see 59 C.J. § 22, note 53.

⁵⁶ *State v Adams*, 323 Mo. 729, 19 S.W. (2) 671.

⁵⁷ *Brown v State*, 32 Tex. Crim. 119, 22 S.W. 596.

⁵⁸ *State Note Board v Atty. Gen.* (Ark.) 54 S.W. (2) 696; *Carroll v Wright*, 131 Ga. 728, 63 S.E. 260; *Chicago, etc., R. Co. v. Wolfe*, 61 Neb. 502, 86 N.W. 441, aff. 187 U.S. 638, 47 L.Ed. 344, 23 S.Ct. 847; *In re Likins*, 223 Pa. 468, 72 Atl. 862. *City of Rockwood v Rodgers*, 154 Tenn. 638, 290 S.W. 381. If the body of a statute is within the scope of the call, the mere fact that the title exceeds its scope does not invalidate the statute. *Maricopa County Water Dist. v LaPrade* (Ariz.) 40 Pac. (2) 94.

⁵⁹ *In re Likins*, 223 Pa. 468, 72 Atl. 862; *In re Likins Petition*, 37 Pa. Super. 625; *Brewer v City of Point Pleasant* (W.Va.) 172 S.E. 717. Or a liberal construction—*Pierson v Hendricksen* (Mont.) 38 Pac. (2) 991; *Appeal of Van Dyke* (Wis.) 259 N.W. 700; *Brewer v City of Point Pleasant*, 114 W.Va. 572, 173 S.E. 717.

⁶⁰ *Wells v Mo. Pac. R. Co.*, 110 Mo. 286, 19 S.W. 530; *State v Clancy*, 30 Mont. 529, 77 Pac. 312; *City of Rockwood v Rodgers*, 154 Tenn. 638, 290 S.W. 381; *State v Shores*, 31 W.Va. 491, 7 S.E. 413. And note *Pope v Oliver* (Ark.) 117 S.W. (2) 1072, that wide range is given to the legislature in deciding what comes within the purview of the governor's call, but that a reasonable interpretation must be exercised in determining the final question of what was within the purview of the call.

language used should be given its ordinary meaning.⁶¹ Every presumption should be raised in favor of the regularity of such legislation.⁶² And whether the enactment of the legislature falls within the subjects submitted by the governor, is a judicial question.⁶³

§ 31. Presiding Officers.—The vice-president is the presiding officer of the senate of the United States.⁶⁴ In the state senate, the lieutenant governor—if there be such an official—generally presides and occupies a position analogous to that of the vice-president in the federal congress.⁶⁵ In the lower house of congress, a speaker is elected,⁶⁶ who undoubtedly was intended by the authors of the constitution to act simply as a chairman. He is chosen by the house of representatives whenever a new congress convenes, although in reality, as we will see hereafter,⁶⁷ he is the selection of the majority party. In the lower house of the state legislature, a speaker, with similar powers and selected in a similar manner to that used in selecting the speaker of the lower house in the federal congress, is the presiding officer.⁶⁸

§ 32. The Caucus.—Our government is one by political parties, even though the constitution does not recognize them so far as their organization and operation are concerned. During most of our history as a nation, there have been two parties—one usually in the majority and controlling both houses of congress and con-

⁶¹ State Note Board v Atty. Gen. (Ark.) 54 S.W. (2) 696.

⁶² Board of Regents v Sullivan (Ariz.) 42 Pac. (2) 619; State Note Board v Atty. Gen., 186 Ark. 605, 54 S.W. (2) 696; Common. v Liveright, 308 Pa. 35, 161 Atl. 697; see also Maricopa County Water Dist. v LaPrade (Ariz.) 40 Pac. (2) 94.

⁶³ Sims v Weldon, 165 Ark. 13, 263 S.W. 42. The court will take judicial notice of the governor's proclamation in determining this question. Wells v Mo. Pac. Ry. Co., 110 Mo. 286, 19 S.W. 530, 15 L.R.A. 847. But see Ball v Presidio County (Tex.C.Ap.) 27 S.W. 702, reversed, 88 Tex. 60, 29 S.W. 1042.

⁶⁴ U.S. Const., Art. I, § 3, para. 4.

⁶⁵ For an example, see Const. N.Y., Art. IV. § 6.

⁶⁶ U.S. Const. Art. I, § 2, para. 5. For history and description of his power, see Follett, M.P., The Speaker of the House of Representatives (1904); for history and development of his power, see Fuller, H.B., Speakers of the House (1909). Also see Hart, H.B., Practical Essays on American Government (1894).

⁶⁷ See § 32, *infra*.

⁶⁸ Beard, American Government and Politics (3rd Ed., 1920), p. 533.

sidering itself responsible for legislation, and the other in the minority and usually an opposition party. In respect to these matters, the caucus⁶⁹ is an important instrumentality. Each political party in the senate and in the house of representatives is organized into a caucus. In its caucus in the house, each party chooses its nominee for speaker, which, in fact, means that the nominee of the majority party will become the speaker since his election is a foregone conclusion, and that the nominee of the minority party will become the floor leader⁷⁰ for his party. The majority party also chooses its floor leader in a caucus. Furthermore, it is in the caucus that the rules of congress are adopted and the general policies of legislation determined. So far as the state legislatures are concerned, the caucus occupies practically the same position that it does in the congress of the United States.

§ 33. Rules.—The committee on rules prepares a set of rules of procedure for adoption by the branch of the legislature for which it acts. So far as congress is concerned, the rules now change very little from term to term, even though the party in the majority changes, until today there is practically a permanent set of rules.⁷¹ It must be remembered, however, that the committee on rules may bring in a rule at any minute during the session and can prepare special rules determining what measure may be next considered. At one time, the rules adopted by legislative bodies controlling legislative procedure, were the only rules to which they were subject. In this sort of a situation, whether or not such rules were to be observed was a matter entirely within the control of

⁶⁹ For a description of the legislative caucus, see Beard, *Readings in American Government and Politics*, p. 112. Also see Willoughby, *Principles of Legislative Organization and Administration* (1934).

⁷⁰ The nature of this position, whether it be that of the minority or majority party, is obvious. Its occupant is to influence and control the votes of the members of his party. It is his duty to direct and manage, for his party, the debate on all important bills and to maintain his party's strength.

⁷¹ See *The Manual of the House of Representatives* and the *Manual of the Senate*; *Jefferson's Manual of Parliamentary Practice*. See also Hinds, A. C., *Parliamentary Precedents of the House of Representatives*; Luce, *Legislative Procedure* (1922). For treatment of legislative rules as applicable to state legislatures, see Mason, *Manual of Legislative Procedure for State Legislatures* (1935).

the legislature and beyond the scope of judicial review.⁷² But today constitutional provisions prescribe many rules which the legislature must obey in the enactment of legislation. These provisions, as an analysis will reveal, indicate that they generally relate to the title and subject matter, the introduction, consideration and passage of bills, and the keeping of legislative journals.

! § 34. **Committees.**—A great deal of the work of the legislature is done by committees, although the amount varies in the several states.⁷³ In fact, every bill is sent to the committee having jurisdiction of the subject matter to which it relates.⁷⁴ The committee may then hold hearings on the bill, and witnesses may appear voluntarily or by virtue of subpoena.⁷⁵ If it so desires, the committee may recommend the passage of the bill, report adversely on it, or ignore it entirely.⁷⁶ Legislative committees may also be appointed for the purpose of making various investigations, in order to obtain information for legislation.⁷⁷ According to some authori-

⁷² *St. Louis etc. R. Co. v Gill*, 54 Ark. 101, 15 S.W. 18, 11 L.R.A. 452. See also *South Georgia Power Co. v Baumann*, 169 Ga. 649, 151 S.E. 513, and Note, 40 L.R.A. (n.s.) 29.

⁷³ See Holcombe, A. N. (2nd Ed.), *State Government in the U.S.*, pp. 261-268.

⁷⁴ Among the usual committees are: ways and means, finance, judiciary, commerce, elections, etc.

⁷⁵ But whether congress, before enacting a bill, shall confer the privilege to interested parties to be heard, is a matter of discretion and not of right. *Norwegian Nitrogen Pro. Co. v U.S.*, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796.

⁷⁶ For a study of the procedure and work of committees of congress, see McConachie, L.G., *Congressional Committees* (1898). Generally, see Reinsch, P.S., *American Legislatures and Legislative Methods* (1907); Winslow, *State Legislative Committees* (1931). Also see Mason, *Manual of Legislative Procedure for State Legislatures* (1931), and Herwitz and Mulligan, *The Legislative Investigating Committee* (1933), 33 Col. L.Rev. 4.

⁷⁷ *Greenfield v Russell*, 292 Ill. 392, 127 N.E. 102, 9 A.L.R. 1334.

ties, this is the only legitimate purpose of investigating committees.⁷⁸

⁷⁸ *McGrain v Daugherty*, 273 U.S. 135; *In re Hague*, 105 N.J. Eq. 134, 147 Atl. 220; *Common. v Costello*, 21 Pa. Dist. 232; *Terrell v King*, 118 Tex. 237, 145 S.W. 786. Some courts even hold that a committee of this character may be empowered to continue after legislative adjournment *sine die*, by virtue of statute or joint resolution. *Branham v Lange*, 16 Ind. 497; *In re Davis*, 58 Kan. 368, 49 Pac. 160; *Commercial & Farmers' Bank v Worth*, 117 N.C. 146, 23 S.E. 160; *People v Backer*, 113 Misc. 400, 185 N.Y.S. 459; *Terrell v King*, *ibid*; *Common v Costello*, *ibid*; *Ex parte Caldwell*, 61 W.Va. 49, 55 S.E. 910. *Contra*: *Brown v Brancto*, 321 Pa. 54, 184 Atl. 89 (appointment by only one house); *Dickinson v Johnson*, 117 Ark. 582, 176 S.W. 116; *Fergus v Russel*, 270 Ill. 304, 110 N.E. 130; *In re Hague*, 105 N.J. Eq. 134, 147 Atl. 220. Also see 84 U.ofPa.L.Rev. 1029 (1936).

CHAPTER V

THE ENACTMENT OF STATUTES

- § 35. House of Origin.
- § 36. Mode of Enactment.
- § 37. Time for Introduction.
- § 38. Notice for Special or Local Laws.
- § 39. Reference to Committees.
- § 40. The Printing of Bills.
- § 41. The Reading of Bills.
- § 42. Emergencies.
- § 43. Voting.
- § 44. Executive Approval and Veto.
- § 45. Enrollment, Authentication, Filing and Publication of Laws.
- § 46. Journal Entries.

§ 35. **House of Origin.**—It may be stated as a general rule that so far as the enactment of laws is concerned, the two houses of the legislature, if there be two, are of equal importance and possess equal power, so that laws may originate in either. To this general rule, however, there is one important exception. The power to originate revenue bills is vested, under the constitutions of many of the states, exclusively in the lower house. This is in accord with the practice in England¹ where bills of this character must originate in the house of commons. Our constitutional provisions of this type are based upon the presumption that, since the membership of the lower house of the legislature is more numerous than that of the upper house and is elected more frequently, it more directly represents the people.² However, the upper house may amend revenue bills,³ and such bills must also have its approval before they become effective. Similarly, the federal con-

¹ Apparently this idea was originally borrowed from the British. *Long v Commonwealth*, 190 Ky. 29, 226 S.W. 379; *In re Opinion of Justices*, 126 Mass. 557. And see note 35 L.R.A. 189, 190.

² *Northern Counties Invest. Trust v Sears*, 30 Ore. 388, 41 Pac. 931, 35 L.R.A. 188 and note.

³ But a bill seeking to amend an existing revenue act must originate in the lower house, as the right to propose amendments to revenue measures applies to pending bills and not to measures after they have been enacted. *In re Opinion of Justices (Ala.)*, 166 So. 807.

stitution provides that all bills for raising revenue shall originate in the house of representatives but that the senate may propose or concur with amendments, as on other bills.⁴ It is often difficult to determine whether a bill is a revenue-raising bill. Usually, if it is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose, it is a bill for raising revenue, or a money bill, as it was technically called at common law.⁵ No law, however, whose collateral and indirect operation might possibly or incidentally conduce to the public or fiscal wealth falls within this classification.⁶ Thus, a statute regulating the sale of securities is not a revenue law, even though the statute provided for the collection of fees.⁷ Consequently, license,⁸ appropriation,⁹ and many other bills¹⁰ are not revenue raising bills.

§ 36. Mode of Enactment.—In order for the legislative will to become a law, it must be expressed in the mode and manner prescribed by the constitution.¹¹ That expression is usually achieved by the passage of a statute,¹² in the manner and form set forth in

⁴ U.S. Const., Art. I, § 7. See also *Bertelsen v White*, 65 Fed. (2) 719.

⁵ *Dundee Mortgage Trust Inv. Co. v. Parrish*, 24 Fed. 197, 201. Also see *Perry County v Selma etc. R. Co.*, 58 Ala. 546.

⁶ *U.S. v Mayo*, 26 Fed. Cas. No. 15,755, 1 Gall. 396; *In re Opinion of the Justices (Colo.)*, 29 Pac. (2) 705 (liquor control).

⁷ *Meek v State (Okla.)*, 22 Pac. (2) 933.

⁸ *Sheppard v Dowling*, 127 Ala. 1, 28 So. 791; *Yourison v State*, 3 Del. 577, 140 Atl. 691; *Ex parte Sales*, 108 Okla. 20, 233 Pac. 186; *State v Wright*, 14 Ore. 365, 12 Pac. 708; *State ex rel Coleman v Lewis*, 181 S.C. 10, 186 S.E. 625 (annual motor vehicle license fee).

⁹ *In re Opinion of Justices*, 126 Mass. 557; *Curryer v Merrill*, 25 Minn. 1.

¹⁰ *Public Utilities Comm. v Manley (Colo.)* 60 Pac. (2) 913 (statute regulating operation of cars for commercial purposes); *State v Driscoll (Mont.)*, 54 Pac. (2) 571 (statute providing for sale of liquor by the state); *Bertelsen v White*, 65 Fed. (2) 719, aff. (D.C.) 58 Fed. (2) 792 (bill establishing merchant marine); *In re Paton's Estate*, 114 N.J. Eq. 324, 168 Atl. 422 (statute exempting certain transfers from tax); *In re Opinions of the Justices (Ala.)*, 136 So. 589 (gasoline tax bill); for others, see *Statutes*, 59 C.J. 532, § 24.

¹¹ *Walnut v Wade*, 103 U.S. 683, 26 L.Ed. 526; *Moody v State*, 48 Ala. 115; *Legg v Annapolis*, 42 Md. 203; *People v Comm. of Highways*, 54 N.Y. 276; *State v Platt*, 2 S.C. 150. See also *Swindell v State*, 143 Ind. 153, 42 N.E. 528, 35 L.R.A. 50; *Commonwealth v Ill. Cent. R. Co.*, 160 Ky. 745, 170 S. W. 171; *State v. Narragansett*, 16 R.I. 424, 16 Atl. 901, 3 L.R.A. 295.

¹² See Chapt. I, § 1, *supra*. And note the following typical provision: "No law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose." Const. Missouri (1875), Art. IV, § 25.

the constitution, although in some cases¹³ and in some jurisdictions,¹⁴ a joint resolution may be used, especially with regard to matters which the constitution does not require to be adopted with the formalities essential for the enactment of a statute.¹⁵ In some states, however, the joint resolution cannot be used for the enactment of legislation upon certain enumerated subjects.¹⁶

§ 37. Time for Introduction.—Any member of the legislature may introduce a bill in the house of which he is a member, in accord with its rules, at any time during which the house is in session, unless the constitution, statutes, or the rules of the house provide otherwise. In some states, constitutional provisions limit the introduction of laws within a specified number of days after the legislature has convened, and sometimes also provide that no bill, or bills of a certain character, usually appropriation bills,¹⁷ shall be introduced during the closing days of the session. These provisions are intended to prevent hasty and improvident legislation, particularly by affording an opportunity for a careful consideration of proposed legislation, and to give the people an opportunity to be heard upon any proposed law.¹⁸ It is obvious that these things are practically impossible if bills may be introduced up to the very hour of adjournment. Although a period may be fixed within

¹³ *State v Bailey*, 16 Ind. 46, 79 Am.Dec. 405; *State v Zimmerman*, 191 Wis. 10, 210 N.W. 381, and note § 3, *supra*.

¹⁴ See Chapt. I, § 3, *supra*. See also *Ward v State (Okla.)*, 56 Pac. (2) 136.

¹⁵ *State v Zimmerman*, 191 Wis. 10, 210 N.W. 381. But see *Scudder v Smith*, 331 Pa. 165, 200 Atl. 601, that a mere formal expression of an opinion is not sufficient to create a law. A joint resolution is not a bill.

¹⁶ *U.S. v Ansonia, etc., Co.*, 218 U.S. 452, 54 L.Ed. 1107; 31 S.Ct. 49; *Dickinson v Johnson*, 117 Ark. 582, 176 S.W. 116; *Henderson v Collier Lith. Co.*, 2 Colo. Ap. 251, 30 Pac. 40; *Balderstrom v Brady*, 17 Idaho 567, mot. den. 18 Idaho 238, 108 Pac. 742; *People v Campbell*, 8 Ill. 466; *May v Rice*, 91 Ind. 546; *State v. Cunningham*, 39 Mont. 197, 103 Pac. 497; *Rowley v Medford*, 132 Ore. 405, 285 Pac. 1111. Apparently, *contra*: *State v Knapp*, 102 Kan. 701, 171 Pac. 639; *Smith v Jennings*, 67 S.C. 324, 45 S.E. 821; *err. dis.* 206 U.S. 276, 51 L.Ed. 1061, 27 S.Ct. 610.

¹⁷ See *In re Opinions of Justice (Ala.)*, 166 So. 710, for a case where the constitution even forbade passage of revenue bills during the last five days of the session. And note *Woco Pep Co. v Butler*, 225 Ala. 256, 142 So. 509, that what is meant by such a prohibition is a general revenue bill; consequently a statute regulating the practice of cosmetology was timely introduced.

¹⁸ *Attorney General v Detroit, etc. Plank-Road Co.*, 97 Mich. 589, 56 N.W. 943. And see note 67 L.R.A. 965.

which bills cannot be introduced, the legislature is not limited to the alternative of passing or of refusing to pass the proposed measure. If the measure has been introduced within the designated time limit, either an amendment,¹⁹ or a substituted bill,²⁰ may be introduced notwithstanding the fact that the time limit has expired, provided they fall within the general purpose of the original bill,²¹ and do not constitute an obvious attempt to evade the constitutional requirement.²² Inasmuch as a proper amendment or substitution does not amount to the introduction of a new bill, the period during which bills must be introduced does not apply. But, on the other hand, if the amendment or substitution is not germane or has no relation to the purpose of the bill as originally introduced, it must fall,²³ for it is in substance a new measure.²⁴ And there is no presumption that the subject matter is germane to that of the original bill.²⁵ The foregoing rules are as applicable to statutes introduced at a special session as to those introduced at a regular session of the legislature.²⁶

§ 38. Notice for Special or Local Laws.—In some jurisdictions, constitutional provisions, or statutes, or both, may prescribe that notice be given before the introduction, consideration, and passage

¹⁹ An amendment is a change in some of the existing provisions, *Sheridan v Salem*, 14 Ore. 328, 12 Pac. 925, or "that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original." *McCleary v Babcock*, 169 Ind. 228, 82 N.E. 453.

²⁰ A substitute is in effect an enlarged amendment. *Hale v McGettigan*, 114 Calif. 112, 45 Pac. 1049.

²¹ *Hale v McGettigan*, 114 Calif. 112, 45 Pac. 1049; *Attorney-General v Stryker*, 141 Mich. 437, 104 N.W. 737; *Davock v Moore*, 105 Mich. 120, 63 N.W. 424, 28 L.R.A. 783; *Detroit v Schmid*, 128 Mich. 379, 87 N.W. 383 (substituted bill); *State v Ryan*, 92 Neb. 636, 139 N.W. 235. Also see *Sayre v Pollard*, 77 Ala. 608; *Powell v Jackson*, 51 Mich. 129.

²² *State v Ryan*, 92 Neb. 636, 139 N.W. 235. See also *Atty.-Gen. v Detroit etc. Plank-Road Co.*, 97 Mich. 589, 56 N.W. 943, and *Sackrider v Saginaw County*, 79 Mich. 59, 44 N.W. 165.

²³ See cases under note 21, *supra*.

²⁴ *People v Loomis*, 135 Mich. 556, 98 N.W. 262.

²⁵ *Detroit v Schmid*, 128 Mich. 379, 87 N.W. 383.

²⁶ *Speed & Worthington v Crawford (Ky.)*, 3 Metc. 207; *Jones v Theall*, 3 Nev. 233.

of any special or local law.²⁷ Constitutional provisions of this character are generally mandatory;²⁸ and, in order for the notice to be sufficient, it should, at least, give the essence or substance of the proposed act,²⁹ and not be misleading.³⁰ But these notice requirements do not, or, at least, should not apply to local or special acts passed at a special session, since the urgency forming the basis for calling the special session supercedes the requirement of notice.³¹ And a statutory requirement of notice obviously does not bind future legislatures,³² since one legislature cannot, because of the very nature of legislative power,³³ limit the power of a subsequent legislature.

²⁷ In re Opinion of Justices, 216 Ala. 469, 113 So. 584; *Holland v Ownbey*, 121 Okla. 102, 217 Pac. 1106. For further discussion of special and local laws, see Chapt. VIII, *infra*. For definition, see § 70, *infra*. The following may be regarded as a typical provision: "No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed, and the notice shall be recited in the act according to its tenor." Const. Missouri, Art. IV, § 54. And this notice must be published in all communities affected. *Steele v Railroad*, 84 Mo. 57.

²⁸ *Larkin v Simmons*, 155 Ala. 272, 46 So. 451; *Booe v Road Dist.*, 141 Ark. 140, 216 S.W. 500; *Harrison v Wilson (Fla.)*, 163 So. 233; *State v Murray*, 47 La. Ann. 1424, 17 So. 832; *Rodolf v Board of Commissioners*, 122 Okla. 120, 251 Pac. 740; *Commonwealth v McMichael*, 8 Pa. Dist. 157; *Cummins v Gaston (Tex.)*, 109 S.W. 476. Contra: *State v Woodruff*, 120 Ark. 406, 179 S.W. 813. And see *McClinch v Sturgis*, 72 Me. 288.

²⁹ *Uniontown v State*, 145 Ala. 471, 39 So. 814; *Carnley v Brunson (Ala.)*, 149 So. 87; *Board of Public Instr. v Brown*, 114 Fla. 711, 154 So. 850. Accordingly, the omission from the published notice of immaterial provisions does not violate the constitution. *Hood v Hood*, 214 Ala. 353, 107 So. 854.

³⁰ *State ex rel Landis v Reardon*, 114 Fla. 755, 154 So. 868.

³¹ *State ex rel Sewerage & Water Board v Michel*, 127 La. 685, 53 So. 926. And see *State ex rel Poterie v Smith*, 184 La. 263, 166 So. 72.

³² *Day v Stetson*, 8 Me. 365; In re Opinion of Court, 63 N.H. 625; *Smith v Helmer*, 7 Barb. (N.Y.) 416; *State v City of Hinton*, 77 W.Va. 266, 87 S.E. 358.

³³ See *infra*, § 133.

§ 39. **Reference to Committees.**³⁴—Sometimes constitutional provisions provide that all bills, after being introduced, shall be referred to a committee before they shall be passed by the legislature, although the prevailing practice is to make this requirement by legislative rule. However, where the requirement is made by the constitution, it must be met in order for the bill to become a valid law.³⁵ But a joint resolution, on the other hand, does not need to be submitted to a committee merely because of the existence of a constitutional provision of this type.³⁶

§ 40. **The Printing of Bills.**—If the constitution requires that all bills be printed before consideration and passage as a prerequisite to becoming a valid enactment, the requirement is mandatory and must be met,³⁷ even as to a time limit, if one be fixed, for placing printed copies on the desks of the legislators.³⁸ Such copies, however, need only to be printed before the proposed law is read in order to meet the requirement that a bill must be printed before being considered or enacted.³⁹ And the requirement that the bill be printed and on the desk of the members, in final form, three days before final passage, does not require that it shall be on the desks of the members of either house for three days before passage by that house.⁴⁰ These principles of law also apply to amendments, if a provision of the constitution requires that they

³⁴ See Chapt. IV, § 34, *supra* for further treatment of committees. And note *Appeal of Van Dyke*, 217 Wis. 528, 259 N.W. 700, 98 A.L.R. 1332, that the legislature is not bound by facts submitted in the report of a legislative interim committee and is not required to ignore the collective knowledge of its own members.

³⁵ *Walker v Montgomery*, 139 Ala. 468, 36 So. 23. And see *Day Land Co. v State*, 68 Tex. 526, 4 S.W. 865, where passage after reference to only one house was held sufficient. And it is also important that the journal entry show a proper reference. See *State v Dillard*, 196 Ala. 539, 72 So. 56; *Walker v Montgomery*, 139 Ala. 468, 36 So. 23.

³⁶ *Davis v State*, 88 Tex. Crim. 183, 225 S.W. 532.

³⁷ *Neiberger v McCullough*, 253 Ill. 312, 97 N.E. 660; *Ex parte Seward*, 299 Mo. 385, 253 S.W. 356, 31 A.L.R. 665; *State v Burlington R. Co.*, 60 Neb. 741, 84 N.W. 254; *People v Reardon*, 184 N.Y. 431, 77 N.E. 970. See also *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74.

³⁸ *People v Reardon*, 184 N.Y. 431, 77 N.E. 970.

³⁹ *Mass. Mut. Life Ins. Co. v Colorado L.&T. Co.*, 20 Colo. 1, 36 Pac. 793.

⁴⁰ *People v Reardon*, 184 N.Y. 431, 77 N.E. 970.

too shall be printed for use of the legislators before final passage of the bill.⁴¹

§ 41. **The Reading of Bills.**—The constitutions of several states provide that no bill shall have the force of law until it shall have been read in each house on three several days, unless a specified majority of the legislature deem it expedient to dispense with the readings in case of an emergency.⁴² Sometimes a similar requirement is made by legislative rule. In either event, however, the requirement is intended to inform the legislature concerning the proposed law and to prevent hasty legislation.⁴³ Where the requirement is made by the constitution, it must be observed,⁴⁴ but where it is prescribed by legislative rule, its observance is not essential to the validity of the act.⁴⁵ Usually a substantial compliance with such a constitutional provision is sufficient.⁴⁶ Thus, simply a reading of the title may suffice,⁴⁷ unless the further requirement is made that the bill must be read in full⁴⁸ or section by section.⁴⁹ Nor is it necessary that everything which is to become law by the passage of a bill be read. For example, matters which are

⁴¹ That such provisions are mandatory, see *In re House Bill No. 250*, 26 Colo. 234, 57 Pac. 49; *Neiberger v McCullough*, 253 Ill. 312, 97 N.W. 660; *State v Cronin*, 72 Neb. 636, 101 N. W. 325. See also *Pueblo County v Strait*, 36 Colo. 137, 85 Pac. 178.

⁴² See § 108, *infra*, for further treatment of emergency legislation.

⁴³ *State v Buckley*, 54 Ala. 599; *Chrest Co. v Dares*, 40 Ark. 200; *State v Carley*, 89 Fla. 361, 104 So. 577; *Saunders v Board of Liquidation*, 110 La. 313, 34 So. 457; *State v. Platt*, 2 S.C. 150; *Phoenix Ins. Co. v Perkins*, 19 S.D. 59, 101 N.W. 1110; *Smith v Mitchell*, 69 W.Va. 481, 72 S.E. 755.

⁴⁴ *State v Buckley*, 54 Ala. 599; *Weill v Kenfield*, 54 Calif. 111; *In re House Bill No. 250*, 26 Colo. 234, 57 Pac. 49; *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74; *Ryan v Lynch*, 68 Ill. 160; *State v Wagener*, 130 Minn. 424, 153 N. W. 749. This is especially true in those states where the journal entry rule prevails. *Richmond County v Farmers Bank*, 152 N.C. 387, 67 S.E. 969.

⁴⁵ *Sweitzer v Territory*, 5 Okla. 297, 47 Pac. 1094.

⁴⁶ *State v Crawford*, 35 Ark. 237; *Smith v Mitchell*, 69 W.Va. 481, 72 S.E. 755. And note *Tarr v Western Loan & Savings Co.*, 15 Idaho 741, 99 Pac. 1049.

⁴⁷ *Webster v Little Rock*, 44 Ark. 536. Reading twice by title and once at length also held sufficient. *People v McElroy*, 72 Mich. 446, 40 N.W. 750, 2 L.R.A. 609. See also *Saunders v Board of Liquidation*, 110 La. 313, 34 So. 457, and *McClellan v Stein*, 229 Mich. 203, 201 N.W. 209.

⁴⁸ *Tarr v Western Loan & Savings Co.*, 15 Idaho 741, 99 Pac. 1049. See also *State v Dillon*, 42 Fla. 95, 28 So. 781.

⁴⁹ See cases under note 48, *ibid*.

incorporated in the bill by reference, fall within this category.⁵⁰ It is the bill, as drafted, that must be read.⁵¹ If the three readings are required, by virtue of a constitutional provision, to take place on three separate days, the requirement is mandatory.⁵² But the readings need not take place in each house on the same day.⁵³ Nor does the mandatory nature of the requirement prevent the first reading in one house on the day the bill was passed in the other house.⁵⁴ And one of the readings may occur on Sunday, in the absence of a statutory or constitutional provision on the subject.⁵⁵ Or a reading in the committee of the whole may be treated as one reading.⁵⁶ But the necessity of reading the bill three times on the prescribed number of days in each house does not apply to amendments so as to require bills to be read the required number of times in their amended forms,⁵⁷ since it is proper to count those

⁵⁰ *Dew v Cunningham*, 28 Ala. 466; *People v Whipple*, 47 Calif. 592; *Taylor v Davis*, 212 Ala. 282, 102 So. 433, 40 A.L.R. 1052; *Bibbs County Loan Assoc. v Richards*, 21 Ga. 592; *State v Davis*, 116 Kan. 663, 229 Pac. 757. Where the laws have been codified and certain new provisions introduced, the code may be enacted as a whole by a single statute, and a reading of the statute suffices. *Central of Georgia R. Co. v. State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518.

⁵¹ *Santee Mills v Query*, 122 S.C. 158, 115 S.E. 202. See also *Central of Georgia R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518.

⁵² *Kavanaugh v Chandler*, 255 Ky. 182, 72 S.W. (2) 1003, 95 A.L.R. 279; *Smathers v Madison County*, 125 N.C. 480, 34 S.E. 554; *Storm v Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17. But see *Pinn v Nicholson*, 6 Ohio St. 178.

⁵³ *Skipper v Street Improv. Dist.*, 144 Ark. 38, 221 S.W. 866; *State v Perscia*, 130 Tenn. 48, 168 S.W. 1056; *Smith v Mitchell*, 69 W.Va. 481, 72 S.E. 755. And see *State v Crawford*, 35 Ark. 237.

⁵⁴ *Kavanaugh v Chandler*, 255 Ky. 182, 72 S.W. (2) 1003, 95 A.L.R. 279.

⁵⁵ *Ex parte Seward*, 299 Mo. 385, 253 S.W. 356, 31 A.L.R. 665.

⁵⁶ *In re Readings of Bills*, 9 Colo. 641, 21 Pac. 477.

⁵⁷ *Dakota County School Dist. v Chapman*, 152 Fed. 887, 82 C.C.A. 35, cert. den. 205 U.S. 545, 51 L.Ed. 923, 27 S.Ct. 792; *People v Thompson (Calif.)*, 7 Pac. 142; *State v Dillon*, 42 Fla. 95, 28 So. 781; *People v LaSalle Street Trust & Sav. Bank*, 269 Ill. 518, 110 N.E. 38; *Allopathic State Board v Fowler*, 50 La. Ann. 1358, 24 So. 809; *State v Field*, 119 Mo. 593, 24 S.W. 752; *People v Chenango County*, 8 N.Y. 317; *Evanhoff v State Ind. Acc. Comm.*, 78 Ore. 503, 154 Pac. 106; *State v Brown*, 33 S.C. 151, 11 S.E. 641; *Tenn. Coal Co. v Hooper*, 131 Tenn. 611, 175 S.W. 1146; *Capito v Topping*, 65 W.Va. 587, 64 S.E. 845. Also see *Scott v State Board of Assessment (Iowa)*, 267 N.W. 111. Apparently contra: *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74.

readings which occurred before amendment.⁵⁸ This is likewise true with substituted bills, provided the substituted bill is in effect an amendment⁵⁹ and not a new bill.⁶⁰ There is, however, some authority that a bill materially amended must be re-read in its amended form.⁶¹ But logically there is little justification for this view, for so long as the change made amounts only to an amendment, it is not a new bill.⁶² And in the case of substituted bills, so long as they are germane to,⁶³ or concerned with the same subject matter⁶⁴ or embrace the same general principles of the original,⁶⁵ a re-reading is not necessary. Nor is it necessary that the title remain the same,⁶⁶ so long as the bill does not become a new bill by failing to meet any of the requirements just suggested. After all, there is, and properly so,⁶⁷ great liberality in favor of a construction which will hold the substituted bill within the scope of the original so as not to require a re-reading.

§ 42. **Emergencies.**⁶⁸—As above suggested, the legislature is sometimes empowered by the constitution in case of an emergency,

⁵⁸ See cases under note 57, *ibid*.

⁵⁹ *Brown v Road Commrs.*, 173 N.C. 598, 92 S.E. 502; *Frazier v Bd. of Commrs.*, 194 N.C. 49, 138 S.E. 433; *Miller v State*, 3 Ohio St. 475.

⁶⁰ See *State v Nashville Baseball Club*, 127 Tenn. 292, 154 S.W. 1151.

⁶¹ *State v Cox*, 105 Neb. 75, 178 N.W. 913; *State v Ryan*, 92 Neb. 636, 139 N.W. 235; *Frazier v Board of Commrs.*, 194 N.C. 49, 138 S.E. 433; *Claywell v Board of Commrs.*, 173 N.C. 657, 92 S.E. 481; *Miller v State*, 3 Ohio St. 475.

⁶² And besides, if amended bills were required to be re-read for three times, the process of legislation would be interminable. *State v Ryan*, 92 Neb. 636, 139 N.W. 235. For further discussion of amendments, see Chapt. XII, § 115, *et seq.*, *infra*.

⁶³ *People v LaSalle Street Trust & Sav. Bank*, 269 Ill. 518, 110 N.E. 38; *State v Akers*, 92 Kan. 169, 140 Pac. 637; *State v Cox*, 105 Neb. 75, 178 N.W. 913; *Edwards v County Commrs.*, 183 N.C. 58, 110 S.E. 600; *Southern R. Co. v Memphis*, 126 Tenn. 267, 148 S.W. 662; *Smith v Mitchell*, 69 W.Va. 481, 72 S.E. 755; *Hood v City of Wheeling*, 85 W.Va. 578, 102 S.E. 259.

⁶⁴ *State v Collier*, 160 Tenn. 403, 23 S.W. (2) 897.

⁶⁵ *Heiskell v Knox County*, 132 Tenn. 180, 177 S.W. 483.

⁶⁶ *Webster v Little Rock*, 44 Ark. 536; *Illinois Central R. Co. v People*, 143 Ill. 434, 33 N.E. 173, 19 L.R.A. 119; *State v Cox*, 105 Neb. 75, 178 N.W. 913; *Brown v Road Commrs.*, 173 N.C. 598, 92 S.E. 502. See also *State v Nashville Baseball Club*, 127 Tenn. 292, 154 S.W. 1151, where entirely new and foreign matter in the title, created a new bill. *Contra*: *State v Burlington R. Co.*, 60 Neb. 741, 84 N.W. 254.

⁶⁷ See *State v Ryan*, 92 Neb. 636, 139 N.W. 235.

⁶⁸ See § 108, *infra*, for further treatment of Emergency Laws.

to suspend the rule pertaining to the reading of bills. The existence of an emergency is a matter solely for the determination of the legislature.⁶⁹ It must be declared to exist by a prescribed vote of the house having the bill under consideration, usually two-thirds⁷⁰ or four-fifths.⁷¹ And the declaration must be contained in the bill itself, or in a resolution in which the proposed bill is named.⁷² Care should also be exercised to observe the provisions in the constitution concerning the suspension of this rule, as a failure to meet such requirements will often invalidate the act.⁷³

§ 43. **Voting.**—While in most jurisdictions constitutional provisions regulate the manner of voting and the number of votes required for the passage of an act,⁷⁴ in the absence of such provisions, a law may be enacted by a majority vote of the legislative branch having the bill under consideration, in such a manner as it sees fit to adopt and use.⁷⁵ Of course, before any vote can be

⁶⁹ *People v Glenn Co.*, 100 Calif. 419, 35 Pac. 302; *Van Kleeck v Ramer*, 62 Colo. 4, 156 Pac. 1108; *Weyand v Stover*, 35 Kan. 545, 11 Pac. 355; *Hull v Miller*, 4 Neb. 503; *Kadderly v Portland*, 44 Ore. 118, 74 Pac. 710. But see *In re Hoffman*, 155 Calif. 114, 99 Pac. 517, and *Atty.-Gen. ex rel v Lindsay*, 178 Mich. 524, 145 N.W. 98.

⁷⁰ *State v Wagener*, 130 Minn. 424, 153 N.W. 749.

⁷¹ *Frellsen v Mahan*, 21 La. Ann. 79.

⁷² *People v Glenn Co.*, 100 Calif. 419, 35 Pac. 302. And see *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74, where the rule could not be suspended generally or for one day. For a representative constitutional provision, see Mo. Const. (1875), Art. IV, § 36.

⁷³ *Hull v Miller*, 4 Neb. 503. Also see *Lemaire v Crockett*, 116 Me. 263, and *State ex rel Harvey v Lenville*, 318 Mo. 698, 300 S.W. 1066.

⁷⁴ That these provisions are mandatory, see *Burlingham v City*, 213 Fed. 1014; *Butler v Board of Directors*, 103 Ark. 109, 146 S.W. 120; *Rash v Allen*, 24 Del. 444, 76 Atl. 370; *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74; *People v DeWolf*, 62 Ill. 253; *McCullough v State*, 11 Ind. 424; *State v Gould*, 31 Minn. 189, 17 N.W. 276; *State ex rel Schmoll v Dravelle*, 170 S.W. 465, 261 Mo. 515; *State v Davis*, 66 Neb. 333, 92 N.W. 740; *People v Devlin*, 33 N.Y. 269; *State v Schultz*, 44 N.D. 269, 174 N.W. 8.

⁷⁵ *U.S. v Ballin*, 144 U.S. 1, 36 L.Ed. 321, 12 S.Ct. 507; *Cox v Stults Eagle Drug Co.*, 42 Ariz. 1, 21 Pac. (2) 914; *Aikan v Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L.R.A. 149; *Heiskell v Baltimore*, 65 Md. 125, 4 Atl. 116; *Johnson v Great Falls*, 38 Mont. 269, 99 Pac. 1059; *People v Marlborough*, 54 N.Y. 276; *Wilson v Young (Tex.)*, 262 S.W. 873; *Loomis v Calahan*, 196 Wis. 518, 220 N.W. 816. A majority of a quorum is sufficient, unless a larger proportion of a quorum is required. In *re Opinion of Justices*, 228 Ala. 140, 152 So. 901.

taken, a quorum must be present.⁷⁶ Unless some other proportion is clearly indicated, such as a majority of all those elected,⁷⁷ a bare majority of the members present will constitute a quorum.⁷⁸ Thus, a majority of a quorum will suffice to pass a bill unless a larger proportion thereof is required.⁷⁹ Bills of certain types, however, such as local or private acts,⁸⁰ incorporation acts,⁸¹ tax bills⁸² and emergency laws,⁸³ are frequently subject to constitutional provisions requiring passage by a larger vote than that required for bills generally. Obviously, these provisions must be observed in order for such legislation to be validly enacted.⁸⁴

As to the manner or mode of voting, in the absence of any provision in the constitution, it too may be regulated by legislative rules,⁸⁵ and matters consequently may be voted upon *viva voce*, by a rising vote, or by some other similar method.⁸⁶ Even the use of an electric roll call device is proper.⁸⁷ The constitutions of some

⁷⁶ Webb v Carter, 129 Tenn. 182, 165 S.W. 426. And see State ex rel Garland v Guillary, 184 La. 329, 166 So. 94, that a two-thirds vote of the membership of each house meant two-thirds of a quorum of each house.

⁷⁷ People v DeWolf, 62 Ill. 253; County Commrs. v Baker, 141 Md. 623, 119 Atl. 461; Kelley v Sec. of State, 149 Mich. 343, 112 N.W. 978; State v Gould, 31 Minn. 189, 17 N.W. 276; State v Mason, 155 Mo. 486, 55 S.W. 636, aff. 179 U.S. 328, 45 L.Ed. 214, 21 S.Ct. 125; Hull v Miller, 4 Neb. 503.

⁷⁸ See Rushville Gas. Co. v Rushville, 121 Ind. 206, 23 N.E. 72, 6 L.R.A. 315.

⁷⁹ In re Opinion of the Justices (Ala.) 152 So. 901.

⁸⁰ People v Allen, 42 N.Y. 378.

⁸¹ DeBow v People, 1 Den. (N.Y.) 9.

⁸² Stanley v Gates, 179 Ark. 886, 19 S.W. (2) 1000; Jones v Chamberlain, 109 N.Y. 100, 16 N.E. 72; Whittaker v Janesville, 33 Wis. 76.

⁸³ Ex parte May (Tex. Cr. App.), 40 S.W. (2) 811.

⁸⁴ Cox v Stults Eagle Drug Co. (Ariz.), 21 Pac. (2) 914; Stanley v Gates, 179 Ark. 886, 19 S.W. (2) 1000; Allen v Auditor, 122 Mich. 324, 81 N.W. 113; People v Murray, 149 N.Y. 367, 44 N.E. 146, 32 L.R.A. 344; Fordyce v Godman, 20 Ohio St. 1; In re Opinion of Justices, 45 R.I. 289, 120 Atl. 868; Ex parte May (Tex. Cr. App.), 40 S.W. (2) 811 (substitute bill).

⁸⁵ Lincoln v Haugen, 45 Minn. 451, 48 N.W. 196.

⁸⁶ Lincoln v Haugen, 45 Minn. 451, 48 N.W. 196.

⁸⁷ Day v Walker (Neb.), 247 N.W. 350.

states, however, expressly provide that on the final passage⁸⁸ of every bill, "the vote shall be by yeas and nays and the same recorded." This obviously is intended to force members present to assume and feel their full responsibility as representatives of the people in matters of legislation and also to furnish definite proof that the bill was enacted by the required vote.^{88a} Such provisions are also considered imperative.⁸⁹ And in those states where the journal entry rule⁹⁰ is recognized, the observance of this constitutional provision is a necessary prerequisite to the validity of all legislation, since the absence of an entry required by the constitution invalidates the law involved.⁹¹ The entry on the journals of the yeas and nays, where required by the constitution, furnishes definite and conclusive evidence whether a bill was passed by the necessary majority.⁹²

§ 44. Executive Approval and Veto.—After a bill has been passed by the legislature, the constitutions of practically every state⁹³ as well as of the federal government,⁹⁴ require that it be

⁸⁸ Where a constitutional provision required the question of "final passage" to be taken immediately upon the last reading of the bill, "final passage" referred to passage of a bill, following last reading, which had been newly introduced or newly received from the other house. *Scott v State Board of Assessment (Iowa)*, 267 N.W. 111. Also see *State ex rel Lane Drug Stores v Simpson (Fla.)*, 166 So. 262, aff. 166 So. 227, that adoption of amendment was not "final passage" of a bill; but note *Cox v Stults Eagle Drug Co. (Ariz.)*, 21 Pac. (2) 914.

^{88a} *Day v Walker*, 124 Neb. 500, 247 N.W. 350.

⁸⁹ *Burlingham v City*, 213 Fed. 1014; *People v Edmands*, 252 Ill. 108, 98 N.E. 914; *Smith v Thompson*, 219 Iowa 888, 258 N.W. 190; *Lincoln v Haugen*, 45 Minn. 451, 48 N.W. 196; *State ex rel Schmoll v Drabelle*, 261 Mo. 515, 170 S.W. 465; *Union Bank v Oxford*, 119 N.C. 214, 25 S.E. 966. But note *People v Chenango*, 8 N.Y. 317.

⁹⁰ See §§ 140, 141 and 142, *infra*, for discussion of Journal Entries.

⁹¹ *Weed v Bergh*, 141 Wis. 569, 124 N.W. 664. For further treatment of such invalidity, see § 140, *infra*.

⁹² *Barnsdall Refining Corp. v Welsh (S.D.)* 269 N.W. 853.

⁹³ Apparently every state, except North Carolina, gives the governor the power to veto laws enacted by the legislature. Beard, *Readings in American Government and Politics* (3rd Ed.), p. 444.

⁹⁴ U.S. Const., Art I, § 7. And although this section of the Federal Constitution requires every order, resolution, or vote to which the concurrence of the Senate and House may be necessary (except on a question of adjournment) to be presented to the president, Congress has devised the measure known as a "concurrent resolution" which, although having the effect of law, is not submitted to the president for his approval or veto. For further treatment of Resolutions, see *supra*, § 3.

presented to the governor or chief executive for his approval.⁹⁵ If he approves it, he signs it.⁹⁶ If not, he returns it to the house from which it originated, with his objections. And under many constitutions, he need not veto the entire act, but can limit his disapproval to certain items.⁹⁷ After the bill has been returned to the house, and upon reconsideration, if it is passed by a two-thirds vote of the legislature, it becomes a law without the executive's approval and in spite of his veto.⁹⁸ He is generally given a specified number of days within which to approve or veto any bill which is presented to him.⁹⁹ Temporary adjournment will not, however, prevent him from making such return.¹⁰⁰ But the authorities are in conflict as to whether a bill can be presented to him after the

⁹⁵ In the absence of a constitutional provision with reference to the manner of presentation, any presentation will suffice which will afford the executive ample opportunity to approve or disapprove. *Harpending v Haight*, 39 Calif. 189; *McKenzie v Moore*, 92 Ky. 216, 17 S.W. 483; *Wrede v Richardson*, 77 Ohio St. 182, 82 N.E. 1072. But constitutional requirements, if any, must be observed. *Lankford v Somerset Co.*, 73 Md. 491, 20 Atl. 1017, 22 Atl. 412.

⁹⁶ A report of approval from the governor is not necessary, in the absence of a constitutional requirement. *Seven Hickory v Ellery*, 103 U.S. 423, 26 L.Ed. 435; *People v Hatch*, 19 Ill. 283; *State v Whisner*, 35 Kan. 271, 10 Pac. 852.

⁹⁷ *State ex rel Wisc. Tel. Co. v Henry*, 218 Wis. 302, 260 N.W. 486, 99 A.L.R. 1267. Apparently this sort of veto applies chiefly to appropriation bills. See *Fergus v Russel*, 270 Ill. 304, 110 N. E. 130; *Peebly v Childers*, 95 Okla. 40, 217 Pac. 1049, and *State ex rel Finnegan v Dammann* (Wis.), 264 N.W. 622. But under the phrase "items or parts of items", the governor cannot disapprove a part of one item. In re Opinion of the Justices (Mass.), 2 N.E. (2) 789; *State ex rel Hudson v Carter* (Okla.), 27 Pac. (2) 617. And the executive cannot reduce specific items, even though he is authorized to disapprove specific items. *Wood v State Administrative Bd.* (Mich.), 238 N.W. 16.

⁹⁸ *State v Deal*, 24 Fla. 293, 4 So. 899, 4 Atl. 370.

⁹⁹ The time varies from three to ten days, so far as state executives are concerned. Dealey, *Our State Constitutions*, p. 31. The president is given ten days for his approval. U.S. Const., Art. I, § 7. And see *Stinson v Smith*, 8 Minn. 366, and *Edwards v U.S.*, 286 U.S. 482, 52 S.Ct. 627, 76 L.Ed. 1239, that Sunday is excluded from the three days period given the executive for approval after final adjournment.

¹⁰⁰ *Wood v State Administrative Bd.* (Mich.), 238 N.W. 16. Also see *Wright v U.S.*, 82 L.Ed. (U.S.) 363, where the return of a disapproved bill during recess of the house in which it originated, was effective to prevent it becoming a law without executive's approval.

final adjournment of the legislature,¹⁰¹ although the better rule favors such a presentment, particularly where the executive in passing on bills is regarded as exercising an executive rather than a legislative function.¹⁰² If a bill may be presented to him after final adjournment, he may clearly veto¹⁰³ or approve it,¹⁰⁴ although statutory or constitutional provisions, if any, must be met.¹⁰⁵ The executive's failure to sign or veto a bill within the prescribed period does not destroy it, for it becomes a law nevertheless by the lapse

¹⁰¹ *Dow v Beidelman*, 49 Ark. 325, 5 S.W. 297; *Preveslin v Derby*, 112 Conn. 129, 151 Atl. 518, 70 A.L.R. 1246; *Johnson v Luers*, 129 Md. 521, 99 Atl. 710; *Hartness v Black*, 95 Vt. 190, 114 Atl. 44. Contra: *Amos v Gunn*, 94 So. 615, 84 Fla. 285; *State v Ryan*, 123 Kan. 767, 256 Pac. 811; In re Opinion of Justices, 76 N.H. 601, 81 Atl. 170. And see *State ex rel Cunningham v Davis* (Fla.), 166 So. 289, that the constitutional limitation of sixty days for the regular session does not prevent presentation to the governor of bills passed during the sixty days after the expiration of such period, since the provision contemplates the performance of the duties imposed upon the legislature within a reasonable time and in due course. Also see *State ex rel Thompson v Davis*, 124 Fla. 592, 169 So. 199. And note *State v Homiack* (Del.), 172 Atl. 838, where the governor is given thirty days after the adjournment to approve a bill.

¹⁰² *State v Mounts*, 36 W.Va. 179, 14 S.E. 407, 15 L.R.A. 243. Contra: *Memphis v U.S.*, 97 U.S. 293, 24 L.Ed. 920; *Fergus v Russell*, 270 Ill. 304, 110 N.E. 130; *Common. v Barnett*, 199 Pa. St. 161. And note particularly *People v Bowen*, 21 N.Y. 520. In this connection, it is also interesting to see *Birdsall v Carrick*, 3 Nev. 154, where the organic act of the Nevada territory vested the legislative power in the governor and the legislative assembly and it was held that, since the governor was a part of the legislative body, he could concur in the passage of a law while the other branches had a legal existence. In Michigan, the veto power seems clearly considered a legislative function. *Wood v State Administrative Bd.* (Mich.), 238 N.W. 16. Also see *Koenig v Flynn*, 254 N.Y.S. 339; and *Ex parte Benight* (Okla. Cr. App.), 11 Pac. (2) 208.

¹⁰³ *Harpending v Haight*, 39 Calif. 189; *Seven Hickory v Ellery*, 103 U.S. 423, 26 L.Ed. 435; *Solomon v Commissioners*, 41 Ga. 157; *State v Fagan*, 22 La. Ann. 545; *People v Bowen*, 21 N.Y. 517.

¹⁰⁴ See *Preveslin v Derby Co.*, 112 Conn. 129, 151 Atl. 518, and cases under note 103, *ibid.* Provision is often made in the constitution regarding the presenting of the bill before adjournment. *State v Ryan*, 123 Kan. 767, 256 Pac. 811. Clearly, the adjournment meant is final adjournment, *Miller v Hurford*, 11 Neb. 377, or adjournment *sine die*. *State ex rel Sullivan v Dammann* (Wis.), 267 N.W. 433.

¹⁰⁵ Thus, it may be provided in the constitution that the governor shall file the bill with his objection, if vetoed, with the secretary of state. *People v McCullough*, 210 Ill. 488, 71 N.E. 602; *Woessner v Bullock*, 176 Ind. 166, 42 N.E. 1057.

of time.¹⁰⁶ His approval may be indicated by signing the bill,¹⁰⁷ and where it is vetoed, he is generally required to state his reasons therefor.¹⁰⁸ If he is required to state his reasons, a failure to do so on his part will render the veto ineffective.¹⁰⁹ Once the bill has been signed and has passed beyond his control,¹¹⁰ or vetoed and returned to the house of its origin, the executive's control ends and he cannot reconsider his action.¹¹¹ On the other hand, the legis-

¹⁰⁶ *Clark v Boyce*, 20 Ariz. 544, 185 Pac. 136; *State v Sessions*, 84 Kan. 856, 115 Pac. 641; *Wartman v Philadelphia*, 33 Pa. St. 202; *Daughtery v State*, 159 Tenn. 573, 20 S.W. (2) 1042. But some constitutions provide that an act shall become law without the governor's signature, if he retains it for a certain number of days after presented to him, unless the final adjournment of the legislature prevents him from returning it within the specified time, and in that case, the act shall not become a law. See *Miller v Hurford*, 11 Neb. 377. For a case holding that an interim adjournment before veto, prevented the law from becoming effective, see *Okanogan Tribes v U.S.*, 49 S.Ct. 463, 279 U.S. 655.

¹⁰⁷ *Porter v Hughes*, 4 Ariz. 1, 32 Pac. 165; *Lukens v Nye*, 156 Calif. 498, 105 Pac. 953; *People v McCullough*, 210 Ill. 488, 71 N.E. 602; *Cooper v Nolan*, 159 Tenn. 379, 19 S.W. (2) 274; *Pickle v McCall*, 86 Tex. 212, 24 S.W. 265.

¹⁰⁸ *State v Sessions*, 84 Kan. 856, 115 Pac. 641; *Birdsall v Carrick*, 3 Nev. 154. But see *Dickinson v Page*, 120 Ark. 377, 179 S.W. 1004, and *Cammack v Harris*, 234 Ky. 846, 29 S.W. (2) 567.

¹⁰⁹ *State v French (Kan.)*, 300 Pac. 1082. And a communication by the governor to the house of origin suggesting amendments does not constitute a veto. *Ex parte Benight*, 53 Okla. Cr. 293, 11 Pac. (2) 208. Nor does the validity of a veto rest upon the soundness of the executive's reasons therefor. *Cascade Tel. Co. v Tax Comm.*, 176 Wash. 616, 30 Pac. (2) 976.

¹¹⁰ *People v McCullough*, 210 Ill. 488, 71 N.E. 602; *State v Whisner*, 35 Kan. 271, 10 Pac. 852; *Cammack v. Harris*, 234 Ky. 846, 29 S.W. (2) 567; *Allegany County v Warfield*, 100 Md. 516, 60 Atl. 599; *State v Junkin*, 79 Neb. 532, 113 N.W. 256; *In re Recall of Bills*, 25 Pa. Dist. 544; *Pickle v McCall*, 86 Tex. 212, 24 S.W. 265. Erasure held ineffective to defeat an approval. *Powell v Hayes*, 83 Ark. 448, 104 S.W. 177. On the other hand, an approval made by mistake could be recalled. *People v Hatch*, 19 Ill. 283. The actual possession of a bill by the attorney general, under the governor's direction, constitutes possession by the governor. *State v Grant Superior Ct.*, 202 Ind. 197, 172 N.E. 897.

¹¹¹ *Parkinson v Johnson*, 160 Calif. 756, 117 Pac. 1057; *State v South Norwalk*, 79 Conn. 257, 58 Atl. 759; *State v Wheeler*, 172 Ind. 578, 89 N.E. 1; *In re Opinion of Justices*, 45 N.H. 607. The veto of a bill is consummated when it is returned to the legislature. *Cammack v Harris*, 234 Ky. 846, 29 S.W. (2) 567. But it is not necessary that the bill be returned to the legislature while it is in session, delivery to the presiding officer, secretary, or a member being sufficient. *State v Holm*, 172 Minn. 162, 215 N.W. 200, 54 A.L.R. 333.

lature may recall a bill after it has been presented to the governor for his approval, in the absence of any constitutional restriction,¹¹² although both houses must consent to such a recall.¹¹³

§ 45. Enrollment, Authentication, Filing and Publication of Laws.—After a law has been passed by the legislature, it is enrolled, sometimes by virtue of constitutional requirements. Enrollment is the preparation of a copy of the act as passed,¹¹⁴ for the signatures of the presiding officers and the governor.¹¹⁵ Those who are empowered to prepare this copy, cannot modify the statute in any respect but must reproduce it as enacted,¹¹⁶ especially in those jurisdictions which adhere to the journal entry rule,¹¹⁷ although minor and clerical errors will not necessarily invalidate the law.¹¹⁸ But in those

¹¹² *Robinson v Ensley* (Ala.), 52 So. 69; *In re Recalling Bills*, 9 Colo. 630, 21 Pac. 474; *State v Sessions*, 84 Kan. 856, 115 Pac. 641; *McKenzie v Moore*, 92 Ky. 216, 17 S.W. 483; *Baltimore Warehouse Co. v Canton Lumber Co.*, 118 Md. 135, 84 Atl. 188; *People v. Devlin*, 33 N.Y. 269; *Teem v State*, 79 Tex. Crim. 285, 183 S.W. 1144. A bill remains in the possession of the legislature until its actual presentation to the executive for his approval. *Jenkins v Entzminger* (Fla.), 135 So. 785.

¹¹³ *Baltimore Warehouse Co. v. Canton Lumber Co.*, 118 Md. 135, 84 Atl. 188; *People v Devlin*, 33 N.Y. 269.

¹¹⁴ *Rice v Lonohe-Cabot Road Imp. Dist.*, 142 Ark. 454, 221 S.W. 179.

¹¹⁵ See *Sharp v Merrill*, 41 Minn. 492, 43 N.W. 385. But enrollment does not always take place before the signing. *Nelson v Haywood County*, 91 Tenn. 596, 20 S.W. 1.

¹¹⁶ *Rice v Lonohe-Cabot Road Imp. Dist.*, 142 Ark. 454, 221 S.W. 179. And see *Ex parte Copeland* (Tex. Cr. App.), 91 S.W. (2) 700, where part of statute was inadvertently omitted.

¹¹⁷ *Chicago R. & Q. R. Co. v Smyth*, 103 Fed. 376; *King Lumber Co. v Crow*, 155 Ala. 504, 46 So. 646; *State v Deal*, 24 Fla. 293, 4 So. 899, 4 Atl. 370; *State v McLelland*, 18 Neb. 236, 25 N.W. 77; *In re Opinion of Justices*, 76 N.H. 601, 81 Atl. 170; *State v Platt*, 2 S.C. 150; *State v Wendler*, 94 Wis. 369, 68 N.W. 759. The enrolled bill must, at least, in substance be the same as the bill passed by the legislature; *Stein v Leeper*, 78 Ala. 517; *State v Deal*, 24 Fla. 293, 4 So. 899, 4 Atl. 370; *Sharp v Merrill*, 41 Minn. 492, 43 N.W. 385; or in legal effect; *Mooz v Randolph*, 77 Ala. 597.

¹¹⁸ *Freitag v Union Stock Yard & Transit Co.*, 262 Ill. 551, 104 N.E. 901, err. dis. 180 Ill. Ap. 268. See also *Concilla v Gelhar* (Ore.) 27 Pac. (2) 179, and *State v Moore*, 37 Neb. 13, 55 N.W. 299. If an error committed in recordation is self-correcting or one apparent on the face of the journal entries, the statute will not be invalid. *State ex rel Adams v Lee* (Fla.) 166 So. 249, aff. 166 So. 262. Nor will the validity of an act be affected where clerical error was made in the report of an amendment to the Senate by the clerk of the house. *Perry v Board of Public Instruction* (Fla.), 137 So. 701.

states where the enrolled act is the sole expository of its contents, as well as conclusive evidence of its passage in the enrolled form,¹¹⁹ a variance with or departure from the journal of the legislature will not affect the enactment's validity.¹²⁰ After the passage of a bill by the legislature, some constitutions also contain provisions requiring that it be signed by the presiding officers of both houses.¹²¹ Sometimes this requirement is made by statute or by legislative rule.¹²² But whether the requirement, if prescribed by the constitution, is mandatory or directory, is a matter upon which there is judicial disagreement.¹²³ Since the signatures are intended to evidence the proper passage of the bill,¹²⁴ as well as to identify it¹²⁵ and to indicate when it is ready for presentation to the governor

¹¹⁹ For discussion of rule, see § 139, *infra*.

¹²⁰ *Ex parte Wren*, 63 Miss. 512, overruling *Brady v West*, 50 Miss. 68; *State v Chester*, 39 S.C. 307, 17 S.E. 752, overruling *State v Hagood*, 13 S.C. 46; *State ex rel Coleman v Lewis*, 181 S.C. 10, 186 S.E. 625; *State v Schmidt*, 42 S.D. 267, 173 N.W. 838.

¹²¹ Where substantial requirement with this provision is sufficient, other officers may sign, such as a temporary speaker; *Robertson v State*, 130 Ala. 164, 30 So. 494; an assistant secretary; *State v Glen*, 18 Nev. 34, 1 Pac. 186. *Contra*, as to presiding officer's secretary: *Porter v Constr. Co.*, 214 Mo. 1, 112 S.W. 235. And bills duly passed during a period of time fixed by the constitution but too near the last hour to be enrolled and signed by the legislative officers and presented to the governor before the end of such period, may be signed and presented within a reasonable time thereafter. *State ex rel Thompson v Davis*, 124 Fla. 592, 169 So. 199. Also see *State ex rel Cunningham v Davis (Fla.)*, 166 So. 289.

¹²² *Field v Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294.

¹²³ **Mandatory:** *King Lumber Co. v. Crow*, 155 Ala. 504, 46 So. 646; *Amos v Gunn*, 84 Fla. 285, 94 So. 615; *State ex rel Cunningham v Davis (Fla.)*, 166 So. 289; *Lynch v Hutchinson*, 219 Ill. 193, 76 N.E. 370; *State v Lynch*, 169 Iowa 148, 151 N.W. 81; *Hamlett v McCreary*, 156 S.W. 410; *In re Election of Executive Officers*, 31 Neb. 262, 47 N.W. 923, 10 L.R.A. 803; *State v Howell*, 26 Nev. 93, 64 Pac. 466; *State v Kiesewetter*, 45 Ohio St. 254, 12 N.E. 807; *Holman v Pabst (Tex.)*, 27 S.W. (2) 340; *State v State Board*, 140 Wash. 433, 249 Pac. 996; *George Bollen Co. v North Platte Irr. Co.*, 19 Wyo. 542, 121 Pac. 22; *Kavanaugh v Chandler*, 255 Ky. 182, 72 S.W. (2) 1003, 95 A.L.R. 279, and note. **Contra:** *Aikman v Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L.R.A. 149; *State v Mickey*, 73 Neb. 281, 102 N.W. 679. Also see Note, 4 Ann.Cas. 905; *State v Missouri Pac. R. Co.*, 100 Neb. 700, 161 N.W. 270; *Speer v Allegheny Plank Road Co.*, 22 Pa. St. 376.

¹²⁴ *Leavenworth Co. v Higgenbotham*, 17 Kan. 62; *State v Glenn*, 18 Nev. 34, 1 Pac. 186; *State v Kiesewetter*, 45 Ohio St. 254, 12 N.E. 807.

¹²⁵ *State v Kiesewetter*, *ibid.*

for his approval,¹²⁶ perhaps the observance should, at least, as a matter of precaution, be held mandatory. A bill, duly authenticated, submitted to the governor and vetoed and passed over his veto, does not require a re-signing by the presiding officers, unless prescribed by the constitution.¹²⁷

Frequently, the filing of a law, after its enactment, with the secretary of state, is made a prerequisite to the law's effectiveness.¹²⁸ So also the publication of a legislative enactment may be prescribed as a condition precedent to its going into force,¹²⁹ although there is authority to the contrary; at least, in effect.¹³⁰ Provisions relative to the time for publication,¹³¹ as well as those regulating the manner and details of publication,¹³² are generally considered directory. The publication, however, should be in the exact words of the enrolled bill,¹³³ even though it means the publishing of misspelled words, inaccuracies, and the including of grammatical errors and the like.¹³⁴ But, of course, in case of any variance between the published statute and the enrolled bill, the latter will

¹²⁶ *State v Robertson*, 41 Kan. 200, 21 Pac. 382; *Taylor v Wilson*, 17 Neb. 88, 22 N.W. 119; *Speer v Allegheny Plank Road Co.*, 22 Pa. 376.

¹²⁷ *Evansville v State*, 118 Ind. 426, 21 N.E. 267, 4 L.R.A. 93; *Perkins v Lucas*, 197 Ky. 1, 246 S.W. 150; *Earnest v Sargent*, 20 N.M. 427, 150 Pac. 1018; *State v State Board*, 140 Wash. 433, 249 Pac. 996. But see *State v Howell*, 26 Nev. 93, 64 Pac. 466.

¹²⁸ The same is true whether the requirement is made by the constitution, *Wabash R. Co. v Hughes*, 38 Ill. 174, or by statute. *State v Whisner*, 35 Kan. 271, 10 Pac. 852; *State v Kiesewetter*, 45 Ohio St. 254, 12 N.E. 807.

¹²⁹ *McCool v State*, 7 Ind. 378; *Calkin v State (Iowa)*, 1 Greene 68; *State v Kiesewetter*, 45 Ohio St. 254, 12 N.E. 807; *Petterman v Huling*, 31 Pa. 432; *Clark v Janesville*, 10 Wis. 136.

¹³⁰ *Culp v Commissioners*, 154 Md. 620, 141 Atl. 410; *State v Armstrong*, 31 N.M. 220, 243 Pac. 333. See also *Petterman v Huling*, 31 Pa. 432, and *Williams v Sapicha (Tex.)*, 59 S.W. 947, where the officer whose duty it was to make publication neglected to do so.

¹³¹ *State v Lean*, 9 Wis. 279.

¹³² *State v Bailey*, 16 Ind. 46, 79 Am.Dec. 405; *Chandler v Spear*, 22 Vt. 388. And see *Buthop v Milwaukee*, 21 Wis. 257.

¹³³ See *Fowler v State*, 81 Tex. Crim. 574, 196 S.W. 951. Of course, the error may and should be indicated in some appropriate manner.

¹³⁴ *Fowler v State*, 81 Tex. Crim. 574, 196 S.W. 951.

prevail.¹³⁵ In making publication, however, the omission of any essential part, such as the enacting clause,¹³⁶ will be fatal, while the omission of some matter which does not change the meaning or alter the legal effect of the statute, would not seem to be of sufficient severity to invalidate the law on the ground that the publication is defective.¹³⁷

§ 46. Journal Entries.—Each house of the legislature is usually required by statute or constitutional provision, to keep a journal of its proceedings and to make entries therein of certain matters, such as the introduction of bills, the vote thereon for and against, and their presentation to the governor.¹³⁸ In the absence of a statutory or constitutional requirement regulating the keeping of jour-

¹³⁵ *Pease v Peck*, 18 How. (U.S.) 595, 15 L.Ed. 518; *Wilson v Duncan*, 114 Ala. 659, 21 So. 1017; *McLaughlin v Menotti*, 105 Calif. 572, 38 Pac. 973, 39 Pac. 207; *Investment Co. v Trueman*, 63 Fla. 184, 57 So. 663; *Davis v Fitzgerald*, 6 Ga. Ap. 532, 65 S.E. 319; *Dishon v Smith*, 10 Iowa 212; *Nugent v Jackson*, 72 Miss. 1040, 18 So. 493; *Ruckert v Grand Ave. R. Co.*, 163 Mo. 260, 63 S.W. 814; *Bruce v State*, 48 Neb. 570, 67 N.W. 454; *People v Marlborough*, 54 N.Y. 276; *Ohio Tax Comm. v Parker*, 117 Ohio 215, 158 N.E. 89, err. dis. 278 U.S. 566, 73 L.Ed. 509, 49 S.Ct. 78; *Williams v Sapicha* (Tex. Civ. Ap.), 59 S.W. 947; *State v Howell*, 80 Wash. 692, 142 Pac. 1; *Combs v City*, 97 W.Va. 395, 125 S.E. 239.

¹³⁶ *In re Swartz*, 47 Kan. 157, 27 Pac. 839. See Note, L.R.A. 1915B, 1065. See also *Weed v Bergh*, 141 Wis. 569, 124 N.W. 664, where form or arrangement was changed.

¹³⁷ *Smith v Hoyt*, 14 Wis. 252. Errors in spelling which do not obscure the sense of the statute will not affect the validity of the law. *Petty v Talbott*, 256 Ky. 688, 76 S.W. (2) 940.

¹³⁸ Also see § 140, *infra*. The following is a representative constitutional provision: "Each house shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either house, on any question, shall, at the desire of any three members present, be entered on the journal." Const. Calif. 1879, Art. IV, § 10.

nals, the entries may be of a most cursory nature.¹³⁹ And in those states where the authenticated and enrolled copy of an act imports absolute verity, the failure to record or make an entry of matters required by the constitution, does not affect the validity of the law.¹⁴⁰ Some states, however, do not adhere to this view but apply what is commonly known as the journal entry rule by virtue of which adherence to the constitutional requirements is essential to the validity of any law, with the result that a failure to make a prescribed entry in the journal invalidates the act.¹⁴¹ Where this

¹³⁹ Thus, it is not necessary to enter either the body or title of the bill. *Cotting v Kansas City Stock Yards Co.*, 82 Fed. 839; *Chicago B. & Q. R. Co. v Smythe*, 103 Fed. 376; *In re Division of Howard County*, 15 Kan. 194. Entry of bill's number, *Dakota County School Dist. v Chapman*, 152 Fed. 887, 82 C.C.A. 35, cert. den. 205 U.S. 545, 51 L.Ed. 923, 27 S.Ct. 792; *Illinois Central R. Co. v People*, 143 Ill. 434, 33 N.E. 173, 19 L.R.A. 119; *Tyson v City of Salisbury*, 151 N.C. 468, 66 S.E. 532, or some other designation which will preserve the identity of the bill with reference to the proceedings connected with its enactment, *Cotting v Kansas City Stock Yards Co.*, supra; *Carswell v Wright*, 133 Ga. 714, 66 S.E. 905; *Illinois Central R. Co. v People*, supra; *East Jefferson Waterworks v Caldwell & Co.*, 170 La. 326, 127 So. 739; *Ex parte Seward*, 299 Mo. 385, 253 S.W. 356, err. dis., 264 U.S. 599, 68 L.Ed. 869, 44 S.Ct. 355; *State v Swiggart*, 118 Tenn. 556, 102 S.W. 75, will suffice. And to the effect that the constitutional provision directing each house to keep journals of its own proceedings does not require entries to be made of every action taken on proposed amendments to pending bills, see *State ex rel Lane Drug Stores v Simpson (Fla.)*, 166 So. 262, aff. 166 So. 227.

¹⁴⁰ *Allen v State*, 14 Ariz. 458, 130 Pac. 1114; *Sherman v Story*, 30 Calif. 253; *Atlantic Coast Line R. Co. v State*, 135 Ga. 545, 69 S.E. 725; *State v Wheeler*, 172 Ind. 578, 89 N.E. 1; *State v Lynch*, 169 Iowa 148, 151 N.W. 81; *Commonwealth v Illinois Central R. Co.*, 160 Ky. 745, 170 S.W. 171; *Louisiana State Lottery Co. v Richoux*, 23 La. Ann. 743; *Annapolis v Harwood*, 32 Md. 471; *Ex parte Wren*, 63 Miss. 512; *Mo. Pac. R. Co. v Price*, 23 Mo. 353; *State v Rogers*, 10 Nev. 250; *Standard Underground Cable Co. v Atty-Gen.*, 46 N.J. 270, 19 Atl. 733; *People v Marlborough*, 54 N.Y. 276; *Carr v Coke*, 116 N.C. 223, 22 S.E. 16, 28 L.R.A. 737; *Atchison etc. R. Co. v State*, 23 Okla. 94, 113 Pac. 921; *Ex parte Tipton*, 28 Tex. Ap. 438, 13 S.W. 610; *State v Jones*, 6 Wash. 452, 34 Pac. 201, 23 L.R.A. 340; and see *Amos v Gunn*, 84 Fla. 285, 94 So. 615; *Narrows v Giles County*, 128 Va. 572, 105 S.E. 82.

¹⁴¹ *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985; *Illinois Central R. Co. v People*, 143 Ill. 434, 33 N.E. 173, 19 L.R.A. 119; *Berry v Baltimore R. Co.*, 41 Md. 446; *Detroit v Bd. of Assessors*, 91 Mich. 78, 51 N.W. 787; *State v McLelland*, 18 Neb. 236, 25 N.W. 77; *Ritzman v Campbell*, 93 Ohio St. 246, 112 N.E. 591; *State v Chester*, 39 S.C. 307, 17 S.E. 752, reversing *State v Platt*, 2 S.C. 150; *State v Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L.R.A. 195.

rule is applied, the legislative journal may be resorted to in order to ascertain whether the prescribed entries have been made.¹⁴² Therefore, if a failure to make a proper entry of any of the essential steps in the enactment of a law, such as the reference of a bill to a standing committee,¹⁴³ the adoption of an amendment,¹⁴⁴ the three readings¹⁴⁵ or their dispensation in case of an emergency,¹⁴⁶ the yeas and nays,¹⁴⁷ or the signing of the bill by the proper officers,¹⁴⁸ is revealed, the law may be declared invalid. Other states, applying the journal entry rule in a somewhat modified form, refuse to declare an act invalid for failure to observe the constitutional provisions pertaining to the passage of laws, unless it affirmatively appears from the journal that the constitutional requirements have not been met.¹⁴⁹ In accordance with this view, mere silence¹⁵⁰ or doubt¹⁵¹ will not invalidate the law, unless the entry be one necessary to the valid enactment of a law because of its mandatory nature.¹⁵² But no matter what view is followed, the

¹⁴² See cases under note 141, *ibid.*

¹⁴³ *State v Dillard*, 196 Ala. 539, 72 So. 56.

¹⁴⁴ *State v Porter*, 145 Ala. 451, 40 So. 144.

¹⁴⁵ *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74; *McClellan v Stein*, 229 Mich. 203, 201 N.W. 209.

¹⁴⁶ *Cohn v Kingsley*, *ibid.*

¹⁴⁷ *Jackson v State*, 171 Ala. 38, 46 So. 268; *Allen v City of Raleigh*, 181 N.C. 453, 107 S.E. 463; *Barnsdall Refining Corp. v Welsh (S.D.)*, 269 N.W. 853.

¹⁴⁸ *Adams v Clark*, 36 Colo. 65, 85 Pac. 642; *Geo. Bollen Co. v North Platte Co.*, 10 Wyo. 542, 121 Pac. 22.

¹⁴⁹ *Moody v State*, 48 Ala. 115; *Adams v Clark*, 36 Colo. 65, 85 Pac. 642; *Speer v Athens*, 85 Ga. 49, 11 S.E. 802; *Hollingsworth v Thompson*, 45 La. Ann. 222, 12 So. 1; *Berry v Baltimore R. Co.*, 41 Md. 446; *State v Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L.R.A. 195. Also note *State ex rel v Drabelle*, 261 Mo. 515, 170 S.W. 465.

¹⁵⁰ *Pelt v Payne*, 90 Ark. 600, 30 S.W. 426; *People v Dunn*, 80 Calif. 211, 22 Pac. 140; *Adams v Clark*, 36 Colo. 65, 85 Pac. 642; *In re Drainage Dist.*, 26 Idaho 311, 143 Pac. 299; *Hollingsworth v Thompson*, 45 La. Ann. 222, 12 So. 1; *Portland v Yick*, 44 Ore. 439, 75 Pac. 706; *State v Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L.R.A. 195.

¹⁵¹ *Clendaniel v Conrad (Dela.)* 3 Boyce 549, 83 Atl. 1036.

¹⁵² *So. Ottawa v Perkins*, 94 U.S. 260; *Post v Supervisors*, 105 U.S. 667; *Ex parte Howard v Harrison Iron Co.*, 119 Ala. 484, 24 So. 516; *Speer v Athens*, 85 Ga. 49, 11 S.E. 802; *In re Drainage Dist.*, 26 Idaho 311, 143 Pac. 299; *Ryan v Lynch*, 68 Ill. 160; *Weyand v Stover*, 35 Kan. 545, 11 Pac. 355; *People v Mahaney*, 13 Mich. 481; *In re Ellis*, 55 Minn. 401, 56 N.W. 1056; *Portland v Yick*, 44 Ore. 439, 75 Pac. 706; *Osburn v Staley*, 5 W.Va. 85.

enrolled act, regular on its face and in the custody of the proper official, is presumed to have been regularly adopted and is prima facie evidence of the law.¹⁵³ So far as the passage of any act is concerned, as a matter of precaution, the journal should show affirmatively that all the constitutional requirements have been fulfilled. And where the failure to observe the constitutional method of enacting a law is asserted, the legislative journals must be considered as a whole.¹⁵⁴

¹⁵³ *Clendaniel v Conrad* (Del.) 3 Boyce 549, 83 Atl. 1036; *Berry v Baltimore R. Co.*, 41 Md. 446; *In re Ellis*, 55 Minn. 401, 56 N.W. 1056; *Heiskell v Knox County*, 132 Tenn. 180, 177 S.W. 483; *State v Jones*, 6 Wash. 542, 34 Pac. 201, 23 L.R.A. 340.

¹⁵⁴ *State ex rel X-Cel Stores v Lee* (Fla.) 166 So. 568.

CHAPTER VI

THE INITIATIVE AND REFERENDUM

- § 47. In General.
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- § 67. Effective Date of the Measure.

§ 47. **In General.**—The initiative is a device whereby any person may draft a statute, and, on securing the signatures of a small percentage of the voters, can force the submission of such statute

¹ For material on the initiative and referendum, generally, see: Barnett, J.D., *The Operation of the Initiative and Referendum in Oregon* (1915); Beard, C. A. and Schultz, Birl, *Documents on the Initiative and Referendum and Recall* (1912); Lowell, A. L., *Public Opinion and Popular Government* (1913); Munroe, W. B., *The Initiative, Referendum and Recall* (1912); and Oberholtzer, E. P., *The Referendum in America* (1911). Also see Statutes, 59 Corpus Juris, §§ 227-306.

to a popular vote for approval or rejection.² Similarly, the referendum is a device whereby a small percentage of the voters may cause any statute enacted by the legislature, with certain exceptions, to be submitted to the voters for approval by a prescribed majority before the statute may become effective as law.³ While the plans of these two devices vary considerably in the different states,⁴ basically they are all founded on the idea of direct representation. The revival of this idea, which had long been superseded by that of indirect representation, was due largely to a lack of confidence in the legislature, and to a dissatisfaction with the conduct of its members.⁵ The initiative and referendum were efforts,

² Beard, *American Government and Politics* (3rd Ed.) pp. 462-3. See also *State v Hinkle*, 156 Wash. 289, 286 Pac. 839. "The legislative power of the state shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California' but the people reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the legislature, and also reserve the power at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature The first power reserved to the people shall be known as the initiative The second power reserved to the people shall be known as the referendum." Const. Calif., 1879, Art. IV, § 1.

³ Beard, *American Government and Politics* (3rd Ed.), pp. 462-3. See also *Beal v State*, 131 Md. 669, 103 Atl. 99; *State v Becker* (Mo.) 240 S.W. 229; *State v Hinkle*, 156 Wash. 289, 286 Pac. 839. Also see Whitmore v Carr, 2 Calif. Ap. 590, 38 Pac. (2) 802. And note constitutional provision under note 2, *ibid*.

⁴ For some of these variations, see Beard, *American Government and Politics* (3rd Ed.), pp. 469-71. In at least twenty-five states, the constitutions provide for a referendum on some or all legislation. See *Legislation*, 43 Harv. L.Rev. 813, n. 1 (1930). The optional referendum was apparently first introduced into the United States in 1898, in South Dakota. See S.D. Const. (1889), Art. 111, § 1, as amended 1898; also note Dodd, *State Government* (1922) 503.

⁵ Direct legislation was considered by the framers of the federal constitution, but they concluded that responsive legislation could be satisfactorily secured by frequently elected representatives. *State v Clausen*, 85 Wash. 260, 148 Pac. 28. Representation was also the basis of the governments of the colonies; *Beal v State*, 131 Md. 669, 103 Atl. 99. Due to an alleged control over legislation by corporations and groups of individuals, the proposal was made that the principle of direct legislation would again restore the government to the people. *Beal v State*, *supra*. An educated electorate and better means of communication have both assisted in elevating the idea to a place of importance. *State v Becker* (Mo.) 240 S.W. 229.

not to limit or curtail the power of the legislature to enact laws,⁶ but to give the people the power to secure the enactment of laws which they desired but which the legislature either failed, neglected or refused to pass,⁷ and to give them the power to suspend or annul those laws passed by the legislature but not yet effective, which they did not desire to become laws.⁸ Any law that the legislature could have enacted prior to the adoption of the initiative and referendum, they are now able, with few exceptions, to adopt independently of the legislature.⁹ This power vested in the people by the constitution, as we have already stated,¹⁰ does not amount to an unlawful delegation of legislative power. But the initiative and the referendum must be exercised in accord with the constitution,¹¹ and the people cannot directly enact a law in contravention of the constitution any more than they can indirectly do so through their chosen representatives in the legislature.¹² Nor can they, through the use of the referendum, validate an unconstitutional legislative act.¹³

§ 48. **Matters Subject to the Initiative.**—The power vested in the people by virtue of the initiative, is an extensive one, but there are several matters which are not subject to it. Thus, in some states, constitutional provisions provide that the right of the initiative does not extend to the making of appropriations.¹⁴ This exception

⁶ State v Osborn, 16 Ariz. 247, 143 Pac. 117; State v Erickson, 75 Mont. 429, 244 Pac. 287; Baird v Burke County, 53 N.D. 140, 205 N.W. 17; State v Slusher, 119 Ore. 141, 248 Pac. 358; State v Whisman, 36 S.D. 260, 154 N.W. 707.

⁷ See State v Whisman, 36 S.D. 260, 154 N.W. 707.

⁸ Alabam's Freight Co. v Hunt, 29 Ariz. 419, 242 Pac. 658; In re Opinion of Justices (Me.) 107 Atl. 673; Norris v Cross, 25 Okla. 287, 105 Pac. 1000.

⁹ Tendall v Searan (Ark.) 90 S.W. (2) 476.

¹⁰ See supra § 21.

¹¹ State v Mack, 134 Ore. 67, 292 Pac. 306; State v Shafer, 63 N.D. 128, 246 N.W. 874; Culton v Chase, 174 Wash. 363, 25 Pac. (2) 81.

¹² Common. v Higgins (Mass.) 178 N.E. 536; State v Stewart, 53 Mont. 18, 161 Pac. 309; Simpson v Hill, 128 Okla. 269, 263 Pac. 635, 56 A.L.R. 706. Also see Culleton v Chase (Wash.) 25 Pac. (2) 81; State v Shafer (Neb.) 246 N.W. 874, and State ex rel v Becker, 290 Mo. 560, 235 S.W. 1017.

¹³ People v Gould, 345 Ill. 288, 178 N.E. 133.

¹⁴ See State v Dixon, 59 Mont. 58, 195 Pac. 841. But an initiated law may provide that the legislature shall levy a tax and use it for designated purposes. State v Erickson, 75 Mont. 429, 244 Pac. 287. See also Horton v Attorney-General, 269 Mass. 503, 169 N.E. 552; State v Dixon, supra; State Board v Riley, 192 Calif. 158, 218 Pac. 1018.

grows out of the obvious impossibility of the voters having any adequate knowledge of the funds available for appropriation.¹⁵ And, in at least one state, no measure relating to religion or religious practices, can be the subject of the initiative.¹⁶ But in the absence of any constitutional prohibition, the power to enact laws through the initiative, is as extensive as the law making power of the legislature.

§ 49. Matters Subject to the Referendum.—While this right like that of the initiative is also an extensive one, not every act passed by the legislature is subject to it, for frequently certain exceptions are made by provisions in the constitution.¹⁷ Among these exceptions, are emergency laws¹⁸ enacted for immediate relief,¹⁹ enactments for the immediate preservation of the public

¹⁵ *State v Dixon*, 59 Mont. 58, 195 Pac. 841.

¹⁶ *Anderson v Secretary of Commonwealth*, 255 Mass. 366, 151 N.E. 378.

¹⁷ See 43 Harv. L.Rev. 813, 14 (1930) and 44 Harv. L.Rev. 851, 52 (1931). Such exceptions, however, are to be strictly and yet reasonably construed. *State v Forney*, 108 Ohio St. 463, 141 N.E. 16. And note *Warner v White (Ariz.)* 4 Pac. (2) 1000, that the legislature must state why the measure is exempt.

¹⁸ For additional treatment of laws of this character, see *infra* § 108. But the question of referable character is not determined by the statute's designation as an emergency measure. *Flynn v Tax Comm. (N.M.)* 28 Pac. (2) 889. But note *State v Hinkle*, 152 Wash. 221, 277 Pac. 837.

¹⁹ The emergency act should contain a declaration of the wrong sought to be remedied and the need for immediate effectiveness. *Jumper v McCallum*, 179 Ark. 837; *Strange v Levy*, 134 Md. 645, 107 Atl. 549; *Hodges v Snyder*, 43 S.D. 166, 178 N.W. 575; *State v Clausen*, 85 Wash. 260, 148 Pac. 28. But the attachment of a void or unwarranted emergency clause will not prevent a referendum, *State v Thompson*, 323 Mo. 742, 19 S.W. (2) 642; *State v Stewart*, 57 Mont. 144, 187 Pac. 641; *State v Whisman*, 36 S.D. 260, 154 N.W. 707; *State v Hinkle*, 152 Wash. 221, 277 Pac. 837, even though the existence of an emergency is for the determination of the legislature. *Roy v Beveridge*, 125 Ore. 92, 266 Pac. 230; *Hodges v Snyder*, 43 S.D. 166, 178 N.W. 575; *State v Howell*, 85 Wash. 294, 147 Pac. 1159. But in a majority of the courts, recitals of an emergency which are intended to except statutes from the referendum, are held not to be conclusive. *Naudzins v Lahr*, 253 Mich. 216, 234 N.W. 581; *State ex rel Brislawn v Meath*, 84 Wash. 302, 147 Pac. 11. Also see *Dodd—Judicially Non-Enforceable Provisions of Constitutions* (1931) 80 U. of Pa. L.Rev. 54, 84. *Contra: Kadderly v Portland*, 44 Ore. 118, 74 Pac. 710. But it is for the court to determine whether a law is within the exception from the referendum. *State ex rel Veeder v State Board (Mont.)* 33 Pac. (2) 516. Also see § 108, *infra*.

health, peace and safety,²⁰ appropriations that are necessary for the maintenance and support of the government and its existing institutions,²¹ acts levying taxes, the proceeds of which are to be applied to the support of the government and its existing institutions,²² bills reapportioning the state into congressional districts,²³ and the ratification of amendments to the federal constitution.²⁴ But whenever the referendum is permissible, the people may unmake whatever laws they desire no matter how ill-advised or destructive their

²⁰ Warner v White (Ariz.) 4 Pac. (2) 1000; State v Becker, 289 Mo. 660, 233 S.W. 641; State v Stewart, 57 Mont. 144, 187 Pac. 641; Roy v Beveridge, 125 Ore. 92, 266 Pac. 230. And see Legislation, 43 Harv. L.Rev. 813, 815 (1930).

²¹ Winebrenner v Salmon, 155 Md. 563, 142 Atl. 723; Yont v Sec. of Commission (Mass.) 176 N.E. 1; State ex rel Botken v Morrison (S.D.) 249 N.W. 563; State ex rel Burt v Hutchinson (Wash.) 21 Pac. (2) 514; State v Hinkle, 161 Wash. 652, 297 Pac. 1071; and see State v Coyne (S.D.) 237 N.W. 733, where an act providing for registration and licensing and fixing license fees for motor vehicles, was held a law necessary for the support of state institutions. Also note State ex rel Haynes v District Court (Mont.) 78 Pac. (2) 937, that the liquor control act was not an appropriation bill, even though one-half of the fees collected went into the public school fund.

²² Winebrenner v Salmon, 155 Md. 563, 142 Atl. 723; Moreton v Haggerty, 240 Mich. 584, 216 N.W. 450; State v Brown, 112 Ohio St. 590, 148 N.E. 95; State v Hinkle, 161 Wash. 652, 297 Pac. 1071. But note that this exception relates only to self-executing levies. State v Forney, 108 Ohio St. 463, 141 N.E. 16. Nor does it relate to the salary of public officers. State v Eastcott, 53 S.D. 191, 220 N.W. 613.

²³ In re Opinion of Justices, 254 Mass. 617, 151 N.E. 680. Contra: State v Hildebrandt, 94 Ohio St. 154, 114 N.E. 55, aff. 241 U.S. 565, 60 L.Ed. 1172, 36 S.Ct. 708; State v Polley, 26 S.D. 5, 127 N.W. 848. See also Boggs v Jordan, 204 Calif. 207, 267 Pac. 696.

²⁴ Hawke v Smith, 253 U.S. 221, 64 L.Ed. 871, 40 S.Ct. 495, 10 A.L.R. 1054; Whittemore v Terral, 140 Ark. 493, 215 S.W. 686; Prior v Noland, 68 Colo. 263, 188 Pac. 729; In re Opinion of Justices, 118 Me. 544, 107 Atl. 673; In re Opinion of Justices, 262 Mass. 603, 160 N.E. 439; Decker v Vaughan, 209 Mich. 565, 177 N.W. 388. But see State v Howell, 107 Wash. 167, 181 Pac. 920. The weight of authority adopts the view that the amending of the constitution is a federal function derived from the constitution itself, while the referendum relates only to acts or laws of the legislature, and not to resolutions. The minority view contends that the United States has no concern as to the manner of passing on a proposed amendment to the federal constitution. Also see Coleman v Miller, 146 Kan. 390, 71 Pac. (2) 518. And note Donnelly v Myers, 127 Ohio St. 104, 186 N.E. 918, that a law providing for a convention to ratify a proposed amendment to the Federal constitution, was not subject to the referendum.

action may be, although a remedy may exist if their action violates the state or federal constitutions.²⁵

§ 50. **The Petition, Generally.**—The petition is said to be the stepping stone to the exercise of the right of the initiative or of the referendum.²⁶ It is a prerequisite for the submission of an act to the people or for the proposal of a law by them,²⁷ for without a legally sufficient petition, neither of these rights can be exercised.²⁸ Consequently, it is important that all constitutional²⁹ as well as statutory requirements in aid thereof³⁰ be met, although the petition will be liberally construed in determining its sufficiency before it is filed.³¹ In fact, it may be announced, as a general rule, that a petition will or should be deemed sufficient if it substantially complies with all legal requirements,^{31a} and if it appears to be regular in form,³² and free from fraud.³³ The "petition" may con-

²⁵ *Sims v Moeur* (Ariz.) 19 Pac. (2) 679.

²⁶ *State v Perrault*, 34 N.M. 438, 283 Pac. 902. The purpose of the data required is that those interested in protesting may intelligently check the petition. *Harraway v Armstrong*, 95 Colo. 398, 36 Pac. (2) 456.

²⁷ *State v Osborn*, 16 Ariz. 247, 143 Pac. 117; *State v Whisman*, 36 S.D. 260, 154 N.W. 707; *err. dis.* 241 U.S. 643, 60 L.Ed. 1218, 36 S.Ct. 449.

²⁸ *State v Perrault*, 34 N.M. 438, 283 Pac. 902. But see *Beene v Hutto* (Ark.) 96 S.W. (2) 485, that the sufficiency of a petition for initiating a local law is of no importance after voted upon.

²⁹ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65; *State v Hanna*, 31 N.D. 570, 154 N.W. 704.

³⁰ *Boyd v Jordan* (Calif.) 35 Pac. (2) 533.

³¹ At least, the statute fixing the petition's requirements is so construed. *Wood v Byrne*, 60 N.D. 1, 232 N.W. 303; *Boyd v Jordan* (Calif.) 35 Pac. (2) 533. And the court is not bound by the punctuation appearing in the petition, although a strict construction of the initiative measure is required where the public interest is involved.

^{31a} *State v Olcott*, 62 Ore. 277, 125 Pac. 303. Also see *Westbrook v McDonald* (Ark.) 43 S.W. (2) 356; *In re Referendum Petition*, 71 Okla. 91, 175 Pac. 500.

³² *State v Osborn*, 16 Ariz. 247, 143 Pac. 117. That the referendum petition is not required to be in any set form, see *Schumaker v Byrne*, 61 N.D. 220, 237 N.W. 741. For a prescribed form for each of the two processes—the referendum and the initiative—see §§ 10702-3, R.S. Mo. 1929; but each is simply directory. *Sayman v Becker* (Mo.) 269 S.W. 973.

³³ *State v Osborn*, 16 Ariz. 247, 143 Pac. 117.

sist of more than one petition,³⁴ but all the individual petitions going to make up "the petition", must refer to the same act and seek the same object.³⁵ Collectively, they must constitute a single petition. Nor is there any set form for the petition,³⁶ in the absence of statutory or constitutional prescription. The petition, however, must when the referendum is invoked, be confined to a single law.³⁷

§ 51. **Circulation.**—The procedure prescribed by statute for the circulation of petitions usually requires only substantial compliance.³⁸ Where no qualifications are fixed, anyone may circulate them, even a minor,³⁹ although the circulator may be required by law to be a qualified voter, or a signer of the petition, or to possess some other qualification. So also, in the absence of any prohibition, he may be paid a reasonable compensation for his services.⁴⁰ But payment of compensation, even though constituting a criminal offense, does not invalidate the signatures obtained by the paid solicitor.⁴¹ And in the performance of his duties, in order to secure an adequate petition, he should, as a general rule, see the persons who sign⁴² and exercise caution that they sign properly.⁴³ As is obvious, a great deal will depend upon the circulator whether a proper petition is obtained. But the circulator does not have to

³⁴ *Blocker v Sewell* (Ark.) 75 S.W. (2) 658; *In re Opinion of Justices*, 132 Me. 523, 174 Atl. 846; *State v Thurman County*, 97 Wash. 569, 166 Pac. 1126. See also *State v Amsberry*, 104 Neb. 273, 177 N.W. 179, 178 N.W. 822, to the effect that the petition is composed of the various sheets attached. In California, the constitution expressly so provides. Const. Calif., 1879, Art. IV, § 1.

³⁵ *State v Hanna*, 31 N.D. 570, 154 N.W. 704.

³⁶ *Schumacher v Byrne* (N.D.) 237 N.W. 741.

³⁷ *State ex rel Patton v Myers*, 127 Ohio St. 95, 186 N.E. 872, motion overruled, 127 Ohio St. 169, 187 N.E. 241.

³⁸ *Reeves v Smith* (Ark.) 78 S.W. (2) 72; *In re State Question No. 137*, 114 Okla. 132, 244 Pac. 806.

³⁹ *In re State Question No. 138*, 114 Okla. 285, 244 Pac. 801. But note Art. IV, § 1, Const. Calif. 1879: "Any qualified elector of the state shall be competent to solicit said signatures within the county or city and county of which he is an elector."

⁴⁰ *In re State Question No. 138*, 114 Okla. 285, 244 Pac. 801; *In re Initiative Petition* (Okla.) 55 Pac. (2) 455.

⁴¹ *Edwards v Hutchinson* (Wash.) 35 Pac. (2) 90.

⁴² *Morford v Pyle*, 53 S.D. 356, 220 N.W. 907.

⁴³ *State v Olcott*, 62 Ore. 277, 125 Pac. 303.

make any attempt to determine whether the signers are legal voters.⁴⁴

§ 52. **Signers and Signatures.**—The most common qualification for a signer of a petition, is that he be a legal voter,⁴⁵ or elector,⁴⁶ although to qualify as a legal voter, he need not necessarily be registered.⁴⁷ Needless to say, a firm or a corporation cannot sign,⁴⁸ particularly where the signer is required to be a legal voter or an elector. And in those states where the circulator must also be a signer, his signature must appear on the petition.⁴⁹ Furthermore, there is a presumption that the signers are duly qualified.⁵⁰

As a general rule, each signer must personally affix his signature or sign by his mark duly witnessed,⁵¹ but one's name may be signed by another in the presence of the circulator by direct authorization at the time of the signing.⁵² Clearly, if a signature is affixed by another without authority, the signature is void,⁵³ although there is a presumption that every signature is legal.⁵⁴ And, of course, the

⁴⁴ *In re Initiative Petition (Okla.)* 55 Pac. (2) 455.

⁴⁵ *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761; *State v Stewart*, 57 Mont. 397, 188 Pac. 904.

⁴⁶ *Power v Robertson*, 130 Miss. 188, 93 So. 769.

⁴⁷ *Sayman v Becker (Mo.)* 269 S.W. 973; *State v Olcott*, 67 Ore. 214, 136 Pac. 902; *State v Sullivan*, 283 Mo. 546, 224 S.W. 327. *Contra*: *Ahrens v Kerley (Ariz.)* 37 Pac. (2) 375; *In re Initiative Petition (Okla.)* 55 Pac. (2) 455; *State v Howell*, 108 Wash. 340, 184 Pac. 333.

⁴⁸ *In re Referendum Petitions*, 78 Okla. 47, 186 Pac. 485.

⁴⁹ *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761.

⁵⁰ *Kaesser v Becker*, 295 Mo. 93, 243 S.W. 346. And see *In re Referendum Petition*, 71 Okla. 91, 175 Pac. 500; *In re Initiative Petition (Okla.)* 55 Pac. (2) 455.

⁵¹ *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761.

⁵² *Sayman v Becker (Mo.)* 269 S.W. 973. Also see *State ex rel Patton v Myers*, 127 Ohio St. 95, 186 N.E. 872, 90 A.L.R. 570. But *contra*: *In re Opinion of Justices*, 126 Me. 620, 137 Atl. 53.

⁵³ *In re Opinion of Justices*, 126 Me. 620, 137 Atl. 53; *Kaesser v Becker*, 295 Mo. 93, 243 S.W. 346.

⁵⁴ *In re Initiative Petition*, No. 205 (Okla.) 55 Pac. (2) 455. But if two or more signatures are in the same handwriting, they should all be rejected. *Miller v Armstrong*, 84 Colo. 416, 270 Pac. 877. The fact, however, that if a voter's signature appears on both a referendum petition and an initiative petition is no objection. *Sayman v Becker (Mo.)* 269 S.W. 973.

same signature can appear only once.⁵⁵ If the statute requires the insertion of the signer's address or some other pertinent information, it must be given, for it is just as important as his name,⁵⁶ although the address may be inserted by a person other than the signer,⁵⁷ particularly at the authorization of the signer.⁵⁸ Similarly, where the date of the signing is required, it must appear on the petition,⁵⁹ although it too may be filled in by some person for the signer.⁶⁰

Signatures, as well as the addresses and the dates, should be legible, although mere illegibility is no ground for objection.⁶¹ Nor need ink be used, unless required by law.⁶²

And in the absence of any indications to the contrary on its face,⁶³ the petition is *prima facie* proof that the signatures contained in it are genuine,⁶⁴ thus imposing the burden of proof on anyone who questions their genuineness.⁶⁵ Generally, the insufficiency of a signature must be shown within a certain time before the initiative or referendum election.⁶⁶

⁵⁵ *In re House Bill*, 78 Okla. 47, 186 Pac. 485; *O'Brien v Pyle*, 51 S.D. 385, 214 N.W. 623.

⁵⁶ *Mayack v Kerr* (Calif.) 13 Pac. (2) 717 (precinct numbers). And see *Morford v Pyle*, 53 S.D. 356, 220 N.W. 907, that signer should insert his address himself. But note *In Re Referendum Petition*, 18 Ohio St. N.P. N.S. 141; *In re State Question No. 138*, 114 Okla. 285, 244 Pac. 801; *In re Initiative Petition No. 205* (Okla.) 55 Pac. (2) 455. The entry of the signer's address (street numbers) is mandatory and an effective provision against fraud. *Elkins v Milliken* (Colo.) 249 Pac. 655.

⁵⁷ *Harraway v Armstrong* (Colo.) 36 Pac. (2) 456.

⁵⁸ *Schumacher v Byrne* (N.D.) 237 N.W. 741; *State ex rel Patton v Meyers*, 127 Ohio St. 95, 186 N.E. 872, 127 Ohio St. 169, 187 N.E. 241.

⁵⁹ *Morford v Pyle*, 53 S.D. 356, 220 N.W. 907. But see *Harraway v Armstrong*, 95 Colo. 298, 36 Pac. (2) 456.

⁶⁰ *Harraway v Armstrong* (Colo.) 36 Pac. (2) 456; *Schumacher v Byrne* (N.D.) 237 N.W. 741; *In re Referendum Petition*, 18 Ohio N.P. N.S. 141.

⁶¹ *State v Olcott*, 67 Ore. 214, 136 Pac. 902.

⁶² *In re Referendum Petition*, 18 Ohio N.P. N.S. 141 (indelible pencil may suffice).

⁶³ *State v Olcott*, 67 Ore. 214, 136 Pac. 902 (evidence of forgery on part of circulator).

⁶⁴ *State v Olcott*, 67 Ore. 214, 136 Pac. 902. Also see *In re Opinion of Justices*, 126 Me. 620, 137 Atl. 53, and *State ex rel v Carter*, 257 Mo. 52, 165 S.W. 773.

⁶⁵ *State v Olcott*, 67 Ore. 214, 136 Pac. 902.

⁶⁶ See *State v Fulton*, 97 Ohio 325, 120 N.E. 140.

§ 53. **Number of Signatures.**—Constitutional or statutory provisions require that the petition be signed by a prescribed number of qualified signers,⁶⁷ usually a certain percent, varying from five⁶⁸ to ten,⁶⁹ of the voters at the last election⁷⁰ for a particular office. The secretary of state, acting in a ministerial capacity,⁷¹ counts the signatures, but only those which have been certified as genuine.⁷² He cannot count a signature properly withdrawn before it has been received and preliminarily filed with him.⁷³ But the withdrawal to be effective must be done with the same formality that those counted receive,⁷⁴ and before the petition has been finally determined to be sufficient.⁷⁵ The same certification as required of the petition for a referendum or the initiative, is required for a petition of withdrawal.⁷⁶

§ 54. **Verification.**—As is self evident, the verification consists of an affidavit. It is usually made by the circulator,⁷⁷ although others may be authorized to perform this duty. It should state the circulator's qualifications,⁷⁸ and that every person who has signed the petition did so in his presence;⁷⁹ that he believes each signer

⁶⁷ *Dyer v Shaw*, 139 Okla. 165, 281 Pac. 776.

⁶⁸ *State v Sullivan*, 283 Mo. 546, 224 S.W. 327; *State v Burkhart*, 44 S.D. 285, 183 S.W. 870.

⁶⁹ *State v Brodigan*, 44 Nev. 306, 194 Pac. 845; *State v Howell*, 80 Wash. 692, 142 Pac. 1.

⁷⁰ "Preceding election" refers to election immediately preceding the filing of the petition. *State ex rel Ilg v Myers*, 127 Ohio St. 171, 187 N.E. 301.

⁷¹ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65.

⁷² *Kellaher v Kozer*, 112 Ore. 149, 228 Pac. 1086.

⁷³ *Ford v Mitchell* (Mont.) 61 Pac. (2) 815; *People v Hinkle*, 130 Wash. 419, 227 Pac. 327.

⁷⁴ *State v Sullivan*, 283 Mo. 546, 224 S.W. 327; see also *Sayman v Becker* (Mo.) 269 S.W. 973.

⁷⁵ *Ford v Mitchell* (Mont.) 61 Pac. 815.

⁷⁶ *Ford v Mitchell* (Mont.) 61 Pac. 815.

⁷⁷ *Kellaher v Kozer*, 112 Ore. 149, 228 Pac. 1086; *Morford v Pyle*, 53 S.D. 357, 220 N.W. 907. For a form, see § 10704, R.S. Mo., 1929.

⁷⁸ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65. See also *Morford v Pyle*, 53 S.D. 357, 220 N.W. 907.

⁷⁹ *Kaesser v Becker*, 295 Mo. 93, 243 S.W. 346; *Wood v Byrne*, 60 N.D. 1, 232 N.W. 303; *State v Koser*, 105 Ore. 509, 210 Pac. 172.

has correctly stated his name, residence and post office address,⁸⁰ and that he is a legal voter of the county where the petition was circulated.⁸¹ The circulator, or verifier, should, although it may not be mandatory, also state that he is acquainted with the various signers.⁸²

From the foregoing, it is obvious that the chief purpose of the verification is to vouch for the genuineness of the signatures.⁸³ It is such an important part of the petition, that it should be made before the petition is filed with the proper officials.⁸⁴ Indeed, it is an indispensable part of the petition.⁸⁵ Moreover, every sheet of the petition should be verified.⁸⁶ And should the verification be false, the petition may be rejected,⁸⁷ but actual fraud on the part of the circulator as to one signer must be shown in order to affect the signatures of other signers.⁸⁸ There is, and should be considerable hesitancy on the part of officials and the courts to deprive honest signers of the right to have their signatures counted merely because some other signer dishonestly signed the petition, without the guilty knowledge of the circulator.⁸⁹ Indeed, it is hard to justify

⁸⁰ *In re Opinion of Justices*, 126 Me. 620, 137 Atl. 53; *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65; *State v Koser*, 105 Ore. 509, 210 Pac. 172; *Morford v Pyle*, 53 S.D. 357, 220 N.W. 907.

⁸¹ See cases under note 80, *ibid*.

⁸² *In re Opinion of Justices*, 126 Me. 620, 137 Atl. 53; *Morford v Pyle*, 53 S.D. 357, 220 N.W. 907.

⁸³ *In re Opinion of Justices*, *ibid*. But note *Blocker v Sewell* (Ark.) 75 S.W. (2) 658, that failure of the affidavit to state that the circulator believed each signature to be genuine, did not render the petition defective.

⁸⁴ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65; *O'Brien v Pyle*, 51 S.D. 385, 214 N.W. 623.

⁸⁵ *O'Brien v Pyle*, 51 S.D. 385, 214 N.W. 623.

⁸⁶ *State v Sullivan*, 283 Mo. 546, 224 S.W. 327; *In re Opinion of Justices*, 114 Me. 557, 95 Atl. 869; *Kellaher v Kozer*, 112 Ore. 149, 228 Pac. 1086.

⁸⁷ *State v Graves*, 90 Ohio St. 311, 107 N.E. 1018; *Morford v Pyle*, 53 S.D. 357, 220 N.W. 907. At least, its *prima facie* character is destroyed. *Kaessen v Becker*, 295 Mo. 93, 243 S.W. 346.

⁸⁸ *Sayman v Becker* (Mo.) 269 S.W. 973; *State v Olcott*, 62 Ore. 277, 125 Pac. 303.

⁸⁹ See cases under note 88, *ibid*. Consequently, the mere falsity of an affidavit of verification does not establish that the affidavit is fraudulent, since fraud requires scienter or knowledge and the intent to deceive. Accordingly, where the signer stated "W.P.A." as his business, and inserted the number of the month in the date, the later insertion of the month above the number did not render the verification fraudulent. *State ex rel Jensen v Wells* (N.D.) 281 N.W. 99.

the deprivation of any honest signer's right to have his signature counted, even where there is actual fraud between the circulator and some of the signers, unless the signer knew of such fraud when he attached his signature.⁹⁰

§ 55. **Certification.**—The certification of the verification affidavit must be made by a person duly authorized by law to perform the act.⁹¹ Usually, the person so authorized, is a notary public.⁹² He should preferably be a disinterested party,⁹³ and should sign the certificate in his own handwriting,⁹⁴ see that it is properly sealed and dated,⁹⁵ and attach his jurat so that the names of the signers of the petition precede it.⁹⁶ It is his duty to carefully examine the petition and then attach his certificate certifying that he believes the signatures appearing thereon are genuine and that the signers are duly qualified.⁹⁷ But as a general rule, he is not required to resort to extraneous evidence, or even to the registration records in order to justify his certification,⁹⁸ although there is authority to the contrary.⁹⁹ And his certificate is *prima facie* evidence of the matters certified,¹⁰⁰ although proof of actual fraud on the part of the circulator will overcome such evidence.¹⁰¹ The probative value of the

⁹⁰ In this connection, see *Edwards v Hutchinson* (Wash.) 35 Pac. (2) 90, which holds that the sponsor of a petition is not the agent of any signer to the extent that his offenses would bind the signer or invalidate his signature.

⁹¹ *Kellaher v Kozer*, 112 Ore. 149, 228 Pac. 1086.

⁹² *State v Sullivan*, 283 Mo. 546, 224 S.W. 327.

⁹³ *State v Sullivan*, 283 Mo. 546, 224 S.W. 327 (the fact that he is a signer of the petition will not be sufficient to disqualify him). See also *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761 (county clerk as certifying officer).

⁹⁴ *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761.

⁹⁵ *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761; *In re State Question*, No. 137, 114 Okla. 132, 244 Pac. 806. This latter case indicates, however, that the omission will not ordinarily invalidate the certification.

⁹⁶ *Westbrook v McDonald* (Ark.) 43 S.W. (2) 356.

⁹⁷ *State v Kozer*, 105 Ore. 509, 210 Pac. 172; *State v Kozer*, 112 Ore. 149, 228 Pac. 1086.

⁹⁸ *Boggs v Jordan*, 204 Calif. 207, 267 Pac. 696.

⁹⁹ *State v Stewart*, 57 Mont. 397, 188 Atl. 904.

¹⁰⁰ *Kellaher v Kozer*, 112 Ore. 149, 228 Pac. 1086; *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761; *State v Stewart*, 57 Mont. 397, 188 Atl. 904.

¹⁰¹ *Barkley v Pool*, 103 Neb. 629, 173 N.W. 600.

certificate will be thereby destroyed, and none of the signatures counted until affirmatively shown to be genuine.¹⁰²

§ 56. Incorporating or Attaching a Copy of the Statute in Petition.—It will be noted that some states require the petition to contain a full and correct copy of the measure when the petition is filed.¹⁰³ This requirement does not mean that every sheet of the petition must contain a complete copy.¹⁰⁴ It will also suffice if a copy of the measure is attached to the petition.¹⁰⁵ If only a portion of an act is involved, that portion should be incorporated in, or attached to the petition.¹⁰⁶ Constitutional provisions may also require that a description of the proposed law be printed at the top of each blank for signatures.¹⁰⁷ If a description of the law suffices, it should not be misleading,¹⁰⁸ and should not differ substantially from the title.¹⁰⁹ The description, in other words, should give a good survey of the chief features of the law.¹¹⁰

§ 57. Amendment of the Petition.—It is highly important that the petition be in proper form and correct in every essential detail when it is filed with the proper official, for as a general rule, it may not thereafter be amended,¹¹¹ not even by returning it to the circulator for correction.¹¹² Indeed, an amendment made after the petition has been filed may result in the rejection of the entire peti-

¹⁰² In re Initiative Petition (Okla.) 55 Pac. (2) 455.

¹⁰³ See *State v Roach*, 230 Mo. 408, 130 S.W. 689; *State v Amsberry*, 104 Neb. 273, 177 N.W. 179, 178 N.W. 822.

¹⁰⁴ *State v Amsberry*, 104 Neb. 273, 177 N.W. 179, 178 N.W. 822. Contra: *State v Langworthy*, 55 Ore. 303, 104 Pac. 424, 106 Pac. 336.

¹⁰⁵ *State v Olcott*, 62 Ore. 277, 125 Pac. 303. Also see *Westbrook v McDonald* (Ark.) 43 S.W. (2) 356.

¹⁰⁶ *State v Amsberry*, 104 Neb. 273, 177 N.W. 179, 178 N.W. 822.

¹⁰⁷ *Bartling v Wait*, 96 Neb. 532, 148 N.W. 507.

¹⁰⁸ In re Opinion of Justices, 271 Mass. 582, 171 N.E. 294, 69 A.L.R. 388.

¹⁰⁹ In re Opinion of the Justices, 271 Mass. 582, 171 N.E. 294, 69 A.L.R. 388; see also *Brooks v Secretary of Common.*, 257 Mass. 91, 153 N.E. 322.

¹¹⁰ In re Opinion of the Justices, 271 Mass. 582, 171 N.E. 294, 69 A.L.R. 388.

¹¹¹ In re Opinion of Justices, 114 Me. 557, 95 Atl. 869; *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65. But the affidavit of qualification of the circulator has been amended. *Hinkley v Wells*, 57 Calif. Ap. 206, 206 Pac. 1023.

¹¹² See cases under note 111, *ibid*; also see § 58, *infra*. Not yet being a public document, it may be checked and corrected by its sponsors before being filed. *Harraway v Armstrong* (Colo.) 36 Pac. (2) 456.

tion.¹¹³ But provision for the amendment of a petition may be made by the constitution.¹¹⁴

§ 58. **Supplemental Petition.**—In the event the petition is deficient in some respect, the deficiency may be remedied, by a supplemental petition.¹¹⁵ This is not an amendment but a new and separate petition.¹¹⁶ It cannot be filed before the original is filed¹¹⁷ but must be filed within the time prescribed.¹¹⁸

§ 59. **Protests and Objections.**—A qualified voter may challenge the sufficiency of the petition, within the statutory time limit, by following the mode prescribed for that purpose.¹¹⁹ The grounds of protest must be specifically set forth,¹²⁰ put in writing, and made under oath.¹²¹ Written notice must also be given to the person filing the petition as well as to the secretary of state.¹²²

§ 60. **Hearings.**—Usually, the secretary of state is empowered to conduct hearings pertaining to protests. Since the insufficiency of the petition must be established within a specified time before the election,¹²³ the secretary of state must, within a reasonable time after the filing of the protest and without any unnecessary delay,¹²⁴ set a date on which he will hold a hearing.¹²⁵ At this hearing, naturally the burden of proof is on the one who challenges the petition.¹²⁶ Usually, the decisions of the secretary of state will not be

¹¹³ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65.

¹¹⁴ See *Walton v McDonald* (Ark.) 97 S.W. (2) 81.

¹¹⁵ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65.

¹¹⁶ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65.

¹¹⁷ At least, with the county clerk. *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65.

¹¹⁸ See *Dalton v Leland*, 22 Calif. Ap. 481, 135 Pac. 54; *Spahr v Brown*, 19 Ohio Ap. 107.

¹¹⁹ *Powers v Robertson*, 130 Miss. 188, 93 So. 769; *In re Initiative Petition*, 26 Okla. 554, 110 Pac. 647. That a court of equity may also be resorted to; see *Robinson v Armstrong*, 90 Colo. 363, 9 Pac. (2) 481.

¹²⁰ *Ramer v Wright*, 62 Colo. 53, 159 Pac. 1145, 1 A.L.R. 1560.

¹²¹ *Ramer v Wright*, 62 Colo. 53, 159 Pac. 1145, 1 A.L.R. 1560.

¹²² *In re Initiative Petition*, 26 Okla. 554, 110 Pac. 647.

¹²³ See *State v Fulton*, 97 Ohio St. 325, 120 N.E. 140.

¹²⁴ *State ex rel Bryant v Carter* (Okla.) 49 Pac. (2) 217. And the word "immediately" does not permit any delay. *Ford v Mitchell* (Mont.) 61 Pac. (2) 815.

¹²⁵ *In re Initiative Question*, 26 Okla. 554, 110 Pac. 647.

¹²⁶ *Power v Robertson*, 130 Miss. 188, 93 So. 769.

final¹²⁷ but may be reviewed.¹²⁸ If, however, it does not appear affirmatively that he has abused his discretion, his decision will not be disturbed.¹²⁹

§ 61. Filing the Petition.—The petition must be filed within the prescribed time.¹³⁰ It must also be filed with the proper official.¹³¹ But only substantial compliance with the statutory procedure pertaining to the filing is required.¹³² A petition may be filed in sections,¹³³ and such sections may be filed at different times,¹³⁴ provided, of course, the entire petition is filed within the prescribed time limit.

§ 62. Publication or Notice of Proposed Measure.—While constitutional provisions may require the publication of a proposed law in a certain manner in order that the voters may have notice thereof, the legislature can, if no constitutional method for the giving of notice is set up, prescribe one. Where the method is set up in the constitution, it is usually the same as that prescribed for the publication of proposed amendments to the constitution,¹³⁵ while legislative methods generally require the printing of the measure on the petition, or the attachment of the measure to the petition, or the distribution of pamphlets with the title and text of the measure with arguments for and against it, or by publication,

¹²⁷ *Kaesser v Becker*, 295 Mo. 93, 243 S.W. 346; *State v Brown*, 108 Ohio St. 454, 141 N.E. 69. But note *Power v Robertson*, 130 Miss. 188, 93 So. 769, that he exercises quasi-judicial power. And see *In re House Bill*, 78 Okla. 47, 186 Pac. 485.

¹²⁸ *State v Thurston County*, 81 Wash. 623, 143 Pac. 461. The matter, however, is not tried *de novo*. *Miller v Armstrong*, 84 Colo. 416, 270 Pac. 877.

¹²⁹ *In re Initiative Petition*, 26 Okla. 554, 110 Pac. 647.

¹³⁰ *Stewart v Hulett (Ark.)* 117 S.W. (2) 1067; *Alabam's Freight Co. v Hunt*, 29 Ariz. 419, 242 Pac. 658; *Jackson v State*, 101 Ark. 473; *In re Opinion of Justices*, 116 Me. 557, 103 Atl. 761; *State v Carter*, 257 Mo. 52, 165 S.W. 773; *Spahr v Brown*, 19 Ohio Ap. 107; *Erp v Riley*, 40 Okla. 340, 138 Pac. 164; *Libby v Olcott*, 66 Ore. 124. For filing of Supplemental Petition, see § 58, *supra*.

¹³¹ *State v Montana*, 59 Mont. 58, 195 Pac. 841; *Simpson v Hill*, 128 Okla. 269, 263 Pac. 635, 56 A.L.R. 706; *Kellaher v Kozer*, 112 Ore. 149, 228 Pac. 1086; *State v Howell*, 77 Wash. 651, 138 Pac. 286.

¹³² *In re State Question*, No. 138, 114 Okla. 285, 244 Pac. 801.

¹³³ *State v Dixon*, 59 Mont. 58, 195 Pac. 841.

¹³⁴ *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65.

¹³⁵ *In re House Resolution*, 50 Colo. 71, 114 Pac. 293.

or proclamation.¹³⁶ Obviously, any other reasonable means could be prescribed.¹³⁷ In fact, the notice can be inserted in the measure itself, or if it be a statute subject to the referendum, a method may be set up in the statute itself, or by an independent enactment, or even by a resolution.¹³⁸ Regardless of the method or manner of publication, there is a presumption that it has been made in accord with the law, at least, in the absence of facts pointing to the contrary.¹³⁹

§ 63. The Secretary of State.—This official plays an important role in the initiative and referendum. It is he who is generally authorized to control the details from the time the petition is filed until the votes are counted. He determines the sufficiency of the number of signers to the petition,¹⁴⁰ and whether the petition is in proper form.^{140a} He prints the ballot title and submits the measure to the people.¹⁴¹ But in the performance of his duties under the law with reference to these matters, there is some conflict regarding the character of his power. Generally, he is regarded as acting ministerially and not judicially,¹⁴² and the statutes pertaining to his

¹³⁶ *People v LaSalle Trust Co.*, 269 Ill. 518, 110 N.E. 38; *State v Langworthy*, 55 Ore. 303, 104 Pac. 424, 106 Pac. 336.

¹³⁷ *People v LaSalle Trust Co.*, 269 Ill. 518, 110 N.E. 38.

¹³⁸ *Mitchell v Lowden*, 288 Ill. 327, 123 N.E. 566.

¹³⁹ *Gottstein v Lester*, 88 Wash. 462, 153 Pac. 595. See also *Allen v State*, 14 Ariz. 458, 130 Pac. 1114.

¹⁴⁰ *State ex rel Evich v Superior Ct.* (Wash.) 61 Pac. (2) 143.

^{140a} *Preckel v Byrne*, 62 N.D. 634, 244 N.W. 781. Where the referendum petition has prima facie enough signers and enough districts are represented, the secretary of state must file the petition and leave to the courts the determination of questions of latent fraud, forgery and hermetic illegality. *Kaessler v Becker*, 295 Mo. 93, 243 S.W. 346. And prohibition will lie against the secretary of state to prevent him from determining the insufficiency of the petition. *State ex rel v Brown*, 108 Ohio St. 454, 141 N.E. 69.

¹⁴¹ *Boggs v Jordan*, 204 Calif. 207, 267 Pac. 696; *State v Kozer*, 126 Ore. 641, 270 Pac. 513.

¹⁴² *Hodges v Dawdy*, 104 Ark. 583, 149 S.W. 656; *Boggs v Jordan*, 204 Calif. 207, 267 Pac. 696; *People v Ramer*, 61 Colo. 422, 158 Pac. 146; *Thompson v Vaughan*, 192 Mich. 512, 159 N.W. 65; *State v Roach*, 230 Mo. 408, 130 S.W. 689; *State v Amsberry*, 104 Neb. 273, 177 N.W. 179, 178 N.W. 822; *State v Kozer*, 126 Ore. 641, 270 Pac. 513; *State ex rel Coon v Morrison*, 61 S.D. 339, 249 N.W. 318. *Contra*: *In re Initiative Petition*, 26 Okla. 247, 109 Pac. 732.

duties are held to be mandatory rather than discretionary.¹⁴³ Hence, he cannot waive a statutory requirement dealing with the initiative and referendum,¹⁴⁴ or determine the constitutionality of a proposed law.¹⁴⁵ But he can determine whether the document submitted purporting to contain the proposed law has any semblance of a law or is such a matter as is not properly subject to the initiative and referendum.¹⁴⁶

§ 64. The Ballot.—Usually the law makes a number of important requirements regarding the ballot to be used in the initiative and referendum elections. These requirements must be complied with in order for the election to be valid,¹⁴⁷ although substantial compliance may suffice.¹⁴⁸ This seems especially true with reference to the ballot title and the submission clause.

But in the absence of a requirement to the contrary, the full title of the measure does not need to be printed on the ballot.¹⁴⁹ It would appear sufficient if the title would fairly¹⁵⁰ convey to the average voter the general purpose and tenor of the law,¹⁵¹ without

¹⁴³ *Boggs v Jordan*, 204 *Calif.* 207, 267 *Pac.* 696; *People v Ramer*, 61 *Colo.* 422, 158 *Pac.* 146; *Thompson v Vaughan*, 192 *Mich.* 512, 159 *N.W.* 65; *State v Roach*, 230 *Mo.* 408, 130 *S.W.* 689; *State v Kozer*, 126 *Ore.* 641, 270 *Pac.* 513; *Norris v Cross*, 25 *Okla.* 287, 105 *Pac.* 1000.

¹⁴⁴ *State ex rel Trindle v Snell (Ore.)* 60 *Pac.* (2) 964.

¹⁴⁵ *White v Welling (Utah)* 57 *Pac.* (2) 703 (proposed measure was so incomplete, indefinite and ambiguous, that it would be completely unworkable).

¹⁴⁶ *Preckel v Byrne (N.D.)* 244 *N.W.* 781.

¹⁴⁷ *State v Mack*, 134 *Ore.* 67, 292 *Pac.* 306. See also *Noland v Hayward*, 60 *Colo.* 181, 192 *Pac.* 657.

¹⁴⁸ See *Sawyer Stores v Mitchell (Mont.)* 62 *Pac.* (2) 342, where the requirement that a copy of the proposed measure be mailed to each elector, did not abrogate the necessity of complying with the requirements as to what the ballot must contain. And see *Walton v McDonald (Ark.)* 97 *S.W.* (2) 81, that a defective ballot title could be amended by virtue of the provision permitting amendment of the petition.

¹⁴⁹ *People v LaSalle Street Trust*, 269 *Ill.* 518, 110 *N.E.* 38; *Sawyer Stores v Mitchell (Mont.)* 62 *Pac.* (2) 342; *State v Langworthy*, 55 *Ore.* 303, 104 *Pac.* 424, 106 *Pac.* 336.

¹⁵⁰ *Coleman v Sherrill (Ark.)* 75 *S.W.* (2) 248.

¹⁵¹ *State v Langworthy*, 55 *Ore.* 303, 104 *Pac.* 424, 106 *Pac.* 336; *Davis v Van Winkle*, 130 *Ore.* 304, 278 *Pac.* 91, 280 *Pac.* 495. And the word "description" as used in a constitutional provision pertaining to laws initiated or subject to the referendum, means a fair portrayal of the chief features of the measure in words of plain meaning and comprehensible by the voters. In *re Opinion of the Justices (Mass.)* 3 *N.E.* (2) 12.

a tendency to mislead or to give a partisan coloring,^{151a} since the ballot title is obviously intended to be a means of identification of the measure submitted to the electorate.¹⁵² There is no need for it to be so elaborate as to set forth the details of the act,¹⁵³ nor should it be argumentative.¹⁵⁴

The same is equally true with reference to the submission clause, since its purpose is to provide a means by which the voter can express his opinion.¹⁵⁵ The clause will be sufficient if it gives the voter the opportunity to vote "yes" or "no" on the measure.¹⁵⁶

§ 65. The Election.—The statutes relating to the conduct of elections generally will also apply to the initiative and the referendum.¹⁵⁷ But, of course, any special statutes pertaining to the initiative and referendum elections will supersede those applicable to elections generally. Such special statutes are liberally construed,¹⁵⁸ and substantial compliance with their provisions is regarded as sufficient.¹⁵⁹ On the other hand, provisions in the constitution relative to the conduct of the initiative or referendum election are mandatory.¹⁶⁰ They must be met. One of the important prerequisites for an election is proper notice.¹⁶¹ This notice may be

^{151a} *Shepherd v McDonald* (Ark.) 70 S.W. (2) 566.

¹⁵² *Davis v Van Winkle*, 130 Ore. 304, 278 Pac. 91, 280 Pac. 495; *Walton v McDonald* (Ark.) 97 S.W. (2) 81.

¹⁵³ *Walton v McDonald* (Ark.) 97 S.W. (2) 81. Also see *McDonald v Van Winkle* (Ore.) 299 Pac. 1015, that a summary of the context of the measure is not required.

¹⁵⁴ *Wieder v Hoss*, 143 Ore. 122, 21 Pac. (2) 780.

¹⁵⁵ *Allen v State*, 14 Ariz. 458, 130 Pac. 1114; *In re Opinion of Justices*, 271 Mass. 582, 171 N.E. 294, 69 A.L.R. 388; *State v Langworthy*, 55 Ore. 303, 104 Pac. 424, 106 Pac. 336.

¹⁵⁶ *Noland v Hayward*, 60 Colo. 181, 192 Pac. 657; see also *Allen v State*, 14 Ariz. 458, 130 Pac. 1114; *People v LaSalle Street Trust*, 269 Ill. 518, 110 N.E. 38. And note *In re Opinion of Justices* (Mass.) 3 N.E. (2) 12, where information regarding the measure was required to be placed opposite the squares provided for voting. Also see Colo. Stat. Ann. (1935) Ch. 6, § 86.

¹⁵⁷ *State v Perrault*, 34 N.M. 438, 283 Pac. 902; *State v Graves*, 90 Ohio St. 311, 107 N.E. 1018.

¹⁵⁸ *State v Kozer*, 108 Ore. 550, 217 Pac. 827.

¹⁵⁹ *Ex parte Smith*, 49 Okla. 716, 154 Pac. 521. But see *Albright v Sussex County*, 68 N.J. L. 523, 53 Atl. 612.

¹⁶⁰ *Stewart v New Smyrna*, 100 Fla. 1126, 130 So. 575. *Contra: Mitchell v Lowden*, 288 Ill. 327, 123 N.E. 566.

¹⁶¹ *Graf v Hiser*, 144 Md. 418, 125 Atl. 151.

given by a proclamation of the governor,¹⁶² or by publication in the newspapers,¹⁶³ although actual notice has been held sufficient upon the theory that the will of the voters should not be defeated unless unavoidable.¹⁶⁴ Actual notice is indicated where the people vote on the submitted measure.¹⁶⁵

Frequently, problems arise regarding the time the measure will be voted upon. Thus, a constitutional requirement that the measure shall be submitted "at the next regular election" cannot be voted on at an election to fill a vacancy.¹⁶⁶ Similarly, a runoff primary election does not fall within the scope of the "next election,"¹⁶⁷ and "general election" means a state wide election at which the people can vote on matters affecting them as a whole.¹⁶⁸

§ 66. Canvass of Votes.—No citation of authority is needed to affirm the rule that the votes cast at an initiative or referendum election must be counted by those officials who are authorized by law to perform this important duty. Their true function in this respect is naturally to canvass the votes and not to determine the validity of the act voted upon.¹⁶⁹ Obviously, no initiated measure can become effective nor a referred one defeated, unless the prescribed vote favors the submitted proposition. And while, as a general rule, a majority of the votes cast will determine the fate of any submitted measure,¹⁷⁰ there are some variations, particularly with reference to certain types of legislation.¹⁷¹ But, in any event, only the votes of qualified electors can be counted.¹⁷²

§ 67. Effective Date of the Measure.—Although this particular subject is treated generally elsewhere,¹⁷³ it is deemed proper to

¹⁶² *Ex parte Smith*, 49 Okla. 716, 154 Pac. 521.

¹⁶³ *Capps v Judsonia-Steprock*, 154 Ark. 46, 242 S.W. 72.

¹⁶⁴ *State v Lentz*, 50 Mont. 322, 146 Pac. 932.

¹⁶⁵ *State v Lentz*, 50 Mont. 322, 146 Pac. 932.

¹⁶⁶ *Estes v State (Ariz.)* 58 Pac. (2) 753.

¹⁶⁷ *State ex rel Williamson v Carter (Okla.)* 59 Pac. (2) 948.

¹⁶⁸ *Arps v State Highway Comm. (Mont.)* 300 Pac. 549.

¹⁶⁹ *Dickinson v Thorn*, 102 W.Va. 673, 135 S.E. 478.

¹⁷⁰ *State v Mathews*, 134 Okla. 288, 273 Pac. 352; *State v Whisman*, 36 S.D. 260, 154 N.W. 707.

¹⁷¹ See *Mitchell v Lowden*, 288 Ill. 327, 123 N.E. 566 (bond issue).

¹⁷² *Pierson v Cady*, 84 N.J.L. 54, 86 Atl. 167.

¹⁷³ See *infra*, Chapt. XI, § 105, et seq. Also see notes in 50 L.R.A. (N.S.) 209, and L.R.A. 1917 B25.

mention certain of its more important features at this point as they pertain to the initiative and the referendum. In the first place, all acts passed by the legislature to which the referendum is applicable, are suspended by the invocation of the referendum until after the election has been held.¹⁷⁴ This suspension becomes operative when the proper petition is filed,¹⁷⁵ unless the constitution provides that the filing of the petition shall not operate to suspend the legislative act.¹⁷⁶ We have already seen that it is possible for only a part of an act to be made subject to a referendum.¹⁷⁷ Where this is the case, part of the act may become effective upon passage by the legislature, and part may be suspended by the filing of the petition.¹⁷⁸ Even acts in *pari materia*¹⁷⁹ may have their effectiveness, at least for all practical purposes, delayed through the filing of a petition against one of them.¹⁸⁰ Moreover, where the law grants a certain time within which to file the referendum petition, the act of the legislature to which the referendum may be invoked, will not become a law until after the time for filing the petition has expired.¹⁸¹ On the other hand, a referendum cannot be invoked against a law which has already become effective.¹⁸² To hold otherwise, would be contrary to the very purpose of the referendum, which is not to invalidate an act of the legislature, but to suspend its operation until the people have had the opportunity to reject or approve it.¹⁸³

As we have already stated,¹⁸⁴ certain legislative acts are not subject to the referendum. Moreover, referendum provisions,

¹⁷⁴ *State v Jackson*, 119 Miss. 727, 81 So. 1; *State v Becker*, (Mo.) 240 S.W. 229; *State v Carter*, 257 Mo. 52, 165 S.W. 773; *State v Stewart*, 57 Mont. 397, 188 Pac. 904; *Barkley v Pool*, 102 Neb. 799, 169 N.W. 73; *State v Roose*, 90 Ohio St. 345, 107 N.E. 760; *Ex parte Smith*, 49 Okla. 716, 154 Pac. 521.

¹⁷⁵ *State v Carter*, 257 Mo. 52, 165 S.W. 773.

¹⁷⁶ *State v Howard*, 49 Nev. 405, 248 Pac. 44.

¹⁷⁷ See *supra* § 56, note 106.

¹⁷⁸ *State v Roose*, 90 Ohio St. 345, 107 N.E. 760.

¹⁷⁹ For further discussion of acts in *pari materia*, see Chapter XXII, § 231, *infra*.

¹⁸⁰ *State v Dallmeyer*, 295 Mo. 638, 245 S.W. 1066.

¹⁸¹ *State National Bank v Board of Councilmen*, 207 Ky. 543, 269 S.W. 726.

¹⁸² *Alabama's Freight Co. v. Hunt*, 29 Ariz. 419, 242 Pac. 658; *Flynn, Welch & Yates v State Tax Comm.* (N.M.) 28 Pac. (2) 889.

¹⁸³ See cases under note 182, *ibid*.

¹⁸⁴ See *supra*, § 49.

whether or not expressly delaying the effectiveness of legislation, generally contain what is known as a "safety clause" which exempts from the right of referendum "laws necessary for the immediate preservation of the public peace, health or safety".¹⁸⁵ But, where the referendum is added to a constitution which already contains a provision for the enactment of emergency legislation, in order for legislation to take immediate as well as final effect, a "safety clause" and an emergency provision must be combined.¹⁸⁶ As a result, it is necessary to state the existence of an emergency, and, in addition, to state that the law is also necessary for the immediate preservation of the public peace, health, or safety.¹⁸⁷ Whether this view is really correct may be questioned. Newer constitutions, however, incorporate both of these provisions in one provision, and thereby avoid the pitfall existing where the two provisions are separate and apart should the legislature fail to include both the emergency and the safety clauses in the legislation intended for immediate effectiveness.

After a legislative enactment has been approved by the people through the referendum process, the enactment becomes effective as a law as of the time fixed by the constitution, or by statutes in aid of the referendum.¹⁸⁸ And, of course, statutory provisions with reference to the time the act shall become effective, are subordinate to constitutional provisions on the same subject.¹⁸⁹ Generally speaking, the rules pertaining to the effective date of laws initiated by the voters, are of similar import. Thus, constitutional provisions may prescribe that the measure shall become effective within a specified time after it has been approved by the electorate.¹⁹⁰ The

¹⁸⁵ Legislation, 43 Harv.L.Rev. 813 (1930).

¹⁸⁶ *In re Interrogatories of the Gov.*, 66 Colo. 319, 181 Pac. 197; *Hodges v Snyder*, 43 S.D. 166, 178 N.W. 575.

¹⁸⁷ *State ex rel Richards v Whisman*, 36 S.D. 260, 154 N.W. 707; *Sears v Multnomah County*, 49 Ore. 42, 88 Pac. 522. But see *Langer v Crawford*, 36 N.D. 385, 62 N.W. 710. Also see *People ex rel Keefer v Ramer*, 61 Colo. 422, 158 Pac. 146, that a referendum provision was avoided but not the customary delay before taking effect, where only a safety provision was incorporated with the enactment.

¹⁸⁸ *Norris v Cross*, 25 Okla. 287, 105 Pac. 1000; *Salem Hospital v Olcott*, 67 Ore. 448, 136 Pac. 341.

¹⁸⁹ *Rosenthal v Liss (Mass.)* 169 N.E. 142.

¹⁹⁰ *Skidmore v Clausen*, 116 Wash. 403, 199 Pac. 727; *Gottstein v Lister*, 88 Wash. 462, 153 Pac. 595.

measure may also by its own terms fix the date upon which it will become operative as a law.¹⁹¹ Otherwise, and in the absence of a constitutional provision fixing the effective date, the measure will become operative upon its approval by the voters.¹⁹²

¹⁹¹ See *Horton v Attorney Gen.*, 269 Mass. 503, 169 N.E. 552.

¹⁹² *Bradley v Union Bridge and Construction Co.*, 185 Fed. 544; *State v Polley*, 30 S.D. 528, 139 N.W. 118. And a constitutional provision that "any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon and not otherwise" is self-executing. *State ex rel v Com.*, 318 Mo. 1004, 2 S.W. (2) 796.

CHAPTER VII

KIND OF STATUTES, GENERALLY

- § 68. In General.
- § 69. Public and Private Acts Defined and Distinguished.
- § 70. General and Special or Local Acts.
- § 71. Permanent, or Perpetual, and Temporary Acts.
- § 72. Mandatory and Directory Acts.
- § 73. Curative, Remedial and Penal Acts.
- § 74. Declaratory Statutes.
- § 75. Affirmative and Negative Statutes.
- § 76. Permissive, Prohibitive and Preceptive Statutes.
- § 77. Prospective and Retrospective Acts.
- § 78. Repealing and Amendatory Acts.

§ 68. **In General.**—Generically, all statutes may be classified as public or private, or general or special, or local. Public statutes may be further classified with reference to duration into temporary or perpetual statutes; as to their effective date into prospective or retroactive statutes; as to the nature of their operation into directory or mandatory, remedial, declaratory, permissive, prohibitive, preceptive, and repealing statutes; and as to their form into affirmative or negative statutes.¹ And many public statutes may be still further classified as penal.

§ 69. **Public and Private Acts Defined and Distinguished.**—A public act is a universal rule that regards the whole community,² or relates to the public at large.³ And yet, while it is usually general in character and operation and equally applicable to all parts of the state, the fact that it only extends to certain classes of persons or to particular localities, does not destroy its true character and make it a private act.⁴ In other words, it may be applicable to only the smallest political subdivision, or to a small class of the

¹ See Sutherland—Statutory Construction (2nd Ed.) Chapt. XI.

² 1 Blackstone Comm. 86. Also see *Unity v Burrage*, 103 U.S. 447, 26 L.Ed. 405; *In re Slaughter*, 12 Fed. Supp. 206.

³ *Dwarris on Statutes*, 53; also see *Gorham v Springfield*, 21 Me. 58.

⁴ *Henry v State ex rel Armstrong*, 218 Ala. 71, 117 So. 626; *Pierce v Kimball (Me.)* 9 Greenl. 54, 23 Am.Dec. 537.

people, and still be a public law.⁵ The true test is whether it is concerned with the public rather than with a private interest.⁶ A private act, on the other hand, is one which operates only upon particular persons, or is concerned with the particular interest or benefit of certain individuals or classes of persons.⁷ Thus, while a public statute affects the public at large or within certain subdivisions, a private statute relates to or affects a particular person by name, or in such a manner that certain persons or classes of persons are interested in a manner peculiar to themselves and not in common with the entire community.⁸ A public act may, however, contain a private clause, and a private act may contain a provision public in nature.⁹ As a result, a private act which contains some provisions of a public nature is pro tanto a public act.¹⁰ The same is equally true with a public act which contains some provisions of a private nature.

The chief importance in being able to distinguish between public and private statutes lies in the fact that, as a general rule, the courts will take judicial notice of the former¹¹ but not of the latter. Private acts must be pleaded and proved.¹² And in those states which make a difference in the manner in which private and public acts are printed,¹³ the distinction is obviously of further impor-

⁵ *Newton v Mahoning County*, 100 U.S. 548, 25 L.Ed. 710 (county); *Unity v Burrage*, 103 U.S. 447, 26 L.Ed. 405 (county); *People v City of Chicago*, 349 Ill. 304, 182 N.E. 419.

⁶ *Brooks v Hyde*, 37 Calif. 366; *State v Baltimore*, 29 Md. 516; *Cox v State*, 8 Tex. Ap. 254; *Clark v Janesville*, 10 Wis. 136.

⁷ *New York Board of Fire Underwriters v Metropolitan Lloyds of N.Y.*, 33 N.Y.S. 547, 11 Misc. Rep. 646.

⁸ *People v Wright*, 70 Ill. 388; *Montague v State*, 54 Md. 481; *State v Helmes*, 3 N.J.L. 1050; *State v Chambers*, 93 N.C. 600.

⁹ *People v Supervisors*, 43 N.Y. 10; *Allentown v Hower*, 93 Pa. St. 332.

¹⁰ *New York Board of Fire Underwriters v Metropolitan Lloyds of New York City*, 33 N.Y.S. 547, 11 Misc. Rep. 646.

¹¹ *Goldberg v Friedrich*, 279 Pa. St. 572, 124 Atl. 186. Also see § 148, *infra*.

¹² Also see § 148, *infra*.

¹³ For treatment of printing requirements, see *supra*, § 40.

tance.¹⁴ It is also possible that different considerations may enter into the construction of the two kinds of statutes.¹⁵

§ 70. **General and Special or Local Acts.**¹⁶—A general law is one which embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class,¹⁷ while a local act is one whose operation is confined to the property and persons of a limited portion of the state.¹⁸ Similarly, a special act is one which relates to particular persons or things of a class.¹⁹ Due to the importance of general and special or local acts, they are hereafter treated in considerable detail.²⁰

§ 71. **Permanent, or Perpetual, and Temporary Acts.**—A permanent, or perpetual act, is one whose operation is not limited to a particular term of time but which continues in force until it is duly altered or repealed.²¹ A temporary act, on the other hand, is one whose life or duration is fixed for a specified period of time

¹⁴ *Case v Kelly*, 133 U.S. 21, 33 L.Ed. 513, 10 S.Ct. 216.

¹⁵ "In the case of a private act which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favor, because the persons who obtain a private act ought to take care that it is so worded that that which they desire to obtain is plainly stated in it; but when the construction is perfectly clear, there is no difference between the modes of construing a private act and a public act." *Altrincham Union v Cheshire Lines Committee*, L.R. 15 Q.B. Div. 597, 603. Also see § 260, *infra*.

¹⁶ See *infra*, Chapt. VIII, Special, Local and General Laws.

¹⁷ *State ex rel Montgomery v Merrill*, 218 Ala. 149, 117 So. 473; *Van Harlinger v Doyle*, 134 Calif. 53, 66 Pac. 44, 54 L.R.A. 771; *Clendaniel v Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036; *Mix v Nez Perce County*, 18 Idaho 695, 112 Pac. 215; *Iowa Motor Vehicle Ass'n. v Railroad Comms.*, 207 Iowa 461, 221 N.W. 364, 75 A.L.R. 1; *Murray v Ramsly County*, 81 Minn. 359, 84 N.W. 103, 51 L.R.A. 828; *State v Swagerty*, 203 Mo. 517, 102 S.W. 483; *State v State Bank*, 90 Mont. 539, 4 Pac. (2) 717, 80 A.L.R. 1494; *Boorum v Connelly*, 66 N.J.L. 197, 48 Atl. 955; *In re Henneberger*, 155 N.Y. 420; 50 N.E. 61, 42 L.R.A. 132; *In re Washington Street*, 132 Pa. St. 257, 19 Atl. 219, 7 L.R.A. 193; *Utsey v Hiott*, 30 S.C. 360, 9 S.E. 338; *McEldowney v Wyatt*, 44 W.Va. 711, 30 S.E. 239, 45 L.R.A. 609.

¹⁸ *State v Lawler*, 53 N.D. 278, 205 N.W. 880; *Ellis v Frazier*, 38 Ore. 462, 63 Pac. 642, 53 L.R.A. 454; *Evans v Phillips*, 117 Pa. St. 226, 11 Atl. 630; *State v Higgins*, 51 S.C. 51, 28 S.E. 15, 38 L.R.A. 561.

¹⁹ *Iowa Motor Vehicle Ass'n v Railroad Comms.*, 207 Iowa 461, 221 N.W. 364, 75 A.L.R. 1; *State v State Bank*, 52 N.D. 231, 202 N.W. 391.

²⁰ See Chapter VIII, *infra*, § 79, et seq.

²¹ *The Reform*, 3 Wall. (U.S.) 617, 18 L.Ed. 105; *In re Wellington*, 16 Pick. (Mass.) 87; also see *Dwarris*, 74.

at the moment of its enactment, and continues in force, unless sooner repealed, until the expiration of the time fixed for its duration.²²

§ 72. **Mandatory and Directory Acts.**²³—A statute, or one or more of its provisions, may be either mandatory or directory.²⁴ While usually in order to ascertain whether a statute is mandatory or directory, one must apply the rules relating to the construction of statutes; yet it may be stated, as a general rule, that those whose provisions relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance, are directory.²⁵ So, a mandatory statute may be defined as one whose provisions or requirements, if not complied with, will render the proceedings to which it relates illegal and void, while a directory statute is one where non-compliance will not invalidate the proceedings to which it relates.²⁶ Among

²² *Collins v Smith* (Pa.) 6 Whart. 294, 36 Am.Dec. 228; also see *Dwarris*, 74.

²³ For further treatment of mandatory and directory statutes; see *infra*, Chapt. XXIV, *infra*, § 261 et seq.

²⁴ *Alabama Pine Co. v Merchants Bank*, 215 Ala. 66, 109 So. 629, 97 A.L.R. 1184; *State ex rel Ellis v Brown*, 326 Mo. 627, 33 S.W. (2) 104; *State ex rel Warming & Ventilating Co. v Board of Ed.*, 127 Ohio St. 336, 188 N.E. 566; *Security Bank v Barnett*, 169 Okla. 29, 36 Pac. (2) 874; *Deibert v Rhodes*, 291 Pa. 550, 140 Atl. 515; *Price v Tuttle*, 70 Utah 156, 258 Pac. 1016; *First Nat. Bank v Pasco*, 138 Wash. 309, 244 Pac. 975.

²⁵ *Barnett v Prairie Oil & Gas Co.*, 19 Fed. (2) 504; *Quachita Power Co. v Donaghey*, 106 Ark. 48, 152 S.W. 1012; *People v Graham*, 267 Ill. 426, 108 N.E. 699; *Bowen v Minneapolis*, 47 Minn. 115, 49 N.W. 683; see also *Rambeck v LaBree*, 156 Minn. 310, 194 N.W. 643; *Enid v Champlin Ref. Co.*, 112 Okla. 168, 240 Pac. 604; *Deibert v Rhodes*, 291 Pa. 550, 140 Atl. 515; *Stiner v Powells Hdw. Co.*, 168 Tenn. 99, 75 S.W. (2) 406.

²⁶ See cases under note 25, *supra*. Also see *People v Graham*, 267 Ill. 426, 108 N.E. 699; *State ex rel Ellis v Brown* (Mo.) 33 S.W. (2) 104, and note *Howard v Bodington* (Eng.) 2 P.D. 203: "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. . . . I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act."

some of the matters considered mandatory are acts jurisdictional in statutory proceedings,²⁷ regulation of forms of insurance policies,²⁸ and statutes authorizing municipal corporations to levy and collect taxes for payments of debts,²⁹ although, of course, a statute relating to almost any matter may be couched in mandatory language or phraseology.

§ 73. Curative, Remedial and Penal Acts. Curative statutes are those which attempt to cure or correct errors and irregularities in judicial or administrative proceedings, and which seek to give effect to contracts and other transactions between private persons which otherwise would fail to produce their intended consequences on account of some statutory disability or a failure to comply with some technical requirement.³⁰ Remedial acts are those enacted in order to improve and facilitate remedies already existing for the enforcement of rights and for the redress of wrongs or injuries as well as to correct defects, mistakes and omissions in a former law.³¹

A penal act or statute, on the other hand, is one which imposes a penalty for any violation of its provisions;³² or, defined in more detail, it is a statute which imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty, or for the commission of some wrong, that concerns the public good, and is com-

²⁷ Gallop v Smith, 59 Conn. 354, 22 Atl. 334, 12 L.R.A. 353.

²⁸ Equitable Life Assur. Soc. v Clements, 140 U.S. 226, 35 L.Ed. 497, 11 S.Ct. 822. See also Union Indem. Co. v Dodd (C.C.A. 4th) 21 Fed. (2) 709, 55 A.L.R. 735 (application warranties and representations).

²⁹ Rock Island County Supervisors v U.S., ex rel State Bank (U.S.) 4 Wall. 435, 18 L.Ed. 419; People ex rel Reynolds v Common Council, 140 N.Y. 300, 35 N.E. 485.

³⁰ See McSurely v McGrew, 140 Iowa 163, 118 N.W. 415; Rosenthal v Liss, 269 Mass. 353, 169 N.E. 142; Hunt v Rains (Tex.) 7 S.W. (2) 648.

³¹ Falls v Key (Tex.) 278 S.W. 893. A remedial statute is one which confers a remedy, and a remedy is the means employed in enforcing a right or in redressing an injury. Paulsen v Reinecke, 181 La. 917, 160 So. 629, 97 A.L.R. 1184. Osgood v Names, 191 Iowa 1227, 184 N.W. 331; M. H. Vestal Co. v Robertson, 277 Ill. 425, 115 N.E. 629; Weston v J. L. Roper Co., 160 N.C. 263, 75 S.E. 800. A subordinate division of remedial acts has been made into enabling and disabling—enlarging and restraining—statutes. Dwarrris (Potter) on Statutes, p. 55.

³² Taylor v. U. S., 3 How. (U.S.) 197, 11 L.Ed. 559; Diversey v Smith, 103 Ill. 378; Bell v Farwell, 176 Ill. 489, 52 N.E. 346, 42 L.R.A. 804; Globe Pub. Co. v State Bank, 41 Neb. 175, 59 N.W. 683, 27 L.R.A. 854; Peterson v Ball, 211 Calif. 461, 296 Pac. 291, 74 A.L.R. 187 ("punitive statute").

manded or prohibited by law.³³ Strictly speaking, however, penal statutes are those which impose punishment for an offense committed against the state.³⁴ Nevertheless, many statutes which provide for a private action against a wrong-doer are frequently called penal statutes, although strictly they are not so, either by virtue of the liability imposed or the remedy given to the injured person.³⁵ According to some authorities, the primary purpose of penal statutes is to provide punishment and thus deter others from performing the same prohibited act.³⁶

Obviously, a statute may be both remedial and penal,³⁷ or even penal in one part and remedial in another.³⁸ Sometimes it is not easy to decide whether a statute is penal or remedial. The substance and effect rather than mere form is the decisive factor,³⁹ although if a penalty is provided for, the statute is, at least, penal in character.⁴⁰ The courts do, however, recognize one obvious distinction between a penalty or forfeiture occurring to the benefit of an aggrieved person and a penalty prescribed as a criminal punishment. In the former instance, the statute is regarded as remedial and the penalty is recoverable by a private action.⁴¹

While in some instances it may not be necessary to distinguish

³³ *Huntington v Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123; *State ex rel Spriggs v Robinson*, 253 Mo. 271, 161 S.W. 1169; *Peo. v Crucible Steel Co.*, 151 Mich. 618, 115 N.W. 705.

³⁴ *Huntington v Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123; *Davis v Mills*, 121 Fed. 703, 58 C.C.A. 123; *State v Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969; *People v Wells*, 65 N.Y.S. 319, 52 Ap. Div. 583.

³⁵ *Huntington v Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123; *Sullivan v Hustis*, 237 Mass. 441, 130 N.E. 247, 15 A.L.R. 1360 (wrongful death).

³⁶ *Levy v Superior Court*, 105 Calif. 600, 38 Pac. 965, 29 L.R.A. 811, also see *Dwarris*, 655.

³⁷ *Bell v Farwell*, 176 Ill. 489, 52 N.E. 346, 42 L.R.A. 804; *Grier v Kansas City, etc., R. Co.*, 286 Mo. 523, 228 S.W. 454. Also see *Cummins v Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W. (2) 920.

³⁸ *Farmers, etc., Nat. Bank v Dearing*, 91 U.S. 29, 23 L.Ed. 196; *Levy v Superior Court*, 105 Calif. 600, 38 Pac. 965, 29 L.R.A. 811; *Bell v Farwell*, 176 Ill. 489, 52 N.E. 346, 42 L.R.A. 804; *Ordway v Cent. Nat. Bank*, 47 Md. 217.

³⁹ *Diversey v Smith*, 103 Ill. 378; *Boyd v Mo. Pac. R. Co.*, 249 Mo. 110, 155 S.W. 13; and see *Robinson v Harmon*, 157 Mich. 272, 117 N.W. 664.

⁴⁰ *Bell v Farwell*, 176 Ill. 489, 52 N.E. 346, 42 L.R.A. 804; *Cotton v Common. Loan Co.*, 206 Ind. 626, 190 N.E. 853.

⁴¹ *Brady v Daly*, 175 U.S. 148, 20 S.Ct. 62, 44 L.Ed. 109; *Ordway v Cen. Nat. Bank*, 47 Md. 217; *Aylsworth v Curtis*, 19 R.I. 517, 34 Atl. 1109, 33 L.R.A. 110; *Cherry v Kennedy*, 144 Tenn. 320, 232 S.W. 661.

between a remedial and a penal act or statute, many occasions will arise where the distinction must be made. For example, as a general rule, remedial statutes must be liberally construed,⁴² while penal statutes are subjected to a strict construction.⁴³ And under the doctrine of comity, the courts of one state or country will not execute the penal laws of another.⁴⁴

§ 74. Declaratory Statutes.—Generally speaking, declaratory statutes can be divided into two classes: (1) those declaratory of the common law,⁴⁵ and (2) those declaring the meaning of an existing statute.⁴⁶ Obviously, those declaratory of the common law should be construed according to the common law.⁴⁷ Those of the second class are to be construed as intended to lay down a rule for future cases,⁴⁸ and to act retrospectively.⁴⁹ They closely resemble interpretation clauses,⁵⁰ and their paramount purpose is to remove doubt as to the meaning of existing law, or to correct a construction considered erroneous by the legislature.

§ 75. Affirmative and Negative Statutes.—As is apparent, a statute expressed in affirmative terms is an affirmative statute and

⁴² See § 251, *infra*.

⁴³ See § 240, *infra*.

⁴⁴ *James-Dickinson Farm Mort. Co. v Harry*, 273 U.S. 119, 47 S.Ct. 308, 71 L.Ed. 569; *Brown v Perry*, 104 Vt. 66, 156 Atl. 910, 77 A.L.R. 1294.

⁴⁵ See *Moog v Randolph*, 77 Ala. 597. And note *Campbell v Fourth National Bank*, 137 Ky. 555, 126 S.W. 114, that uniform state laws are declaratory of the common law. But see *Eaton—Negotiable Instruments Law*, 23 Yale L.J. 293, 298 (1913). "Declaratory (laws) are necessarily in their terms, affirmative or negative." *Dwarris (Potter) on Statutes*, p. 68.

⁴⁶ *Sedgwick, Stat. Const.* (2nd) p. 28 (1874).

⁴⁷ *Baker v Baker*, 13 Calif. 87; *Commonwealth v Humphries*, 7 Mass. 242; *Hewey v Nourse*, 54 Me. 256.

⁴⁸ *Basset v U.S.*, 2 Ct. Claims 448; *Les Bois v Bramwell*, 4 How. (U.S.) 449; *Todd v Clapp*, 118 Mass. 495; *McNichol v U.S., etc., Agency*, 74 Mo. 457; *Citizens' Gas Light Co. v Alden*, 44 N.J.L. 648; *Lambertson v Hogan*, 2 Pa. 22; *Linn v Scott*, 3 Tex. 67; *Bernier v Becker*, 37 Ohio St. 72.

⁴⁹ *Postmaster Gen. v Early*, 12 Wheat. (U.S.) 148; *Moser v White*, 29 Mich. 59; *People v Supervisors*, 16 N.Y. 424; *Reiser v Tell*, 39 Pa. St. 137.

⁵⁰ For treatment of such clauses in more detail, see § 208, *infra*. Also see *infra*, Chapter XXXI, §§ 367-431, for some typical interpretation clauses.

one expressed in negative terms a negative statute.⁵¹ The former is generally cumulative;⁵² that is, an existing right,⁵³ or remedy⁵⁴ is continued and a new one created which may be attained or used at one's option.⁵⁵ Thus, an affirmative statute does not abolish the common law that applies to the same subject.⁵⁶ A negative statute, on the contrary, displaces existing law. Similarly, if the new statute is in affirmative form, it does not operate as an implied repeal of existing statutes on the same matter.⁵⁷ It repeals no existing provision in the law, unless manifestly repugnant to it.⁵⁸ But if the latter enactment is in negative form, it will operate to repeal the existing statutory law.⁵⁹

And negative words generally create a mandatory statute.⁶⁰

⁵¹ Sedgwick—Stat. Constr. (2nd Ed.) pp. 29-31. "Next arises the consideration of those statutes which obtain the name of negative statutes, because they are penned in negative terms; as the statute of Marlbridge, which is "Non ideo puniatur Dominus per redemptionem;" and Magna Charta, "Nullus capiatur aut imprisonetur." And there, the rule prevails, that if a subsequent statute contrary to a former, have negative words, it shall be a repeal of the former; and a negative statute it is said too, so binds the common law, that a man cannot afterwards have recourse to the latter.

The different operation of affirmative and negative statutes is thus illustrated: If a statute were to provide that it should be lawful for tenant in fee simple to make a lease for twenty-one years, and that such lease should be good; this affirmative statute could not restrain him from making a lease for sixty years would be good, because it was good by the common law, and to restrain him, it ought to have words negative; as, that it shall not be lawful for him to make a lease for above twenty-one years; or that a lease for more, shall not be good." Dwarris (Potter) on Statutes, p. 71.

⁵² *Jennings v Commonwealth* (Mass.) 17 Pick. 80; *State v Smith*, 63 Vt. 201, 22 Atl. 604.

⁵³ See Dwarris on Statutes, 475.

⁵⁴ *Rex v St. George's Hanover Square*, 3 Camp. 222.

⁵⁵ *Mitchell v Duncan*, 7 Fla. 13; *Raudebaugh v Shelley*, 6 Ohio St. 307.

⁵⁶ *Bruce v Schuyler*, 9 Ill. 221; *Mullen v People*, 31 Ill. 444; *DePauw v New Albany*, 22 Ind. 204; *State v Macon County Court*, 41 Mo. 453; *White v Johnson*, 23 Miss. 68; *McLaughlin v Hoover*, 1 Ore. 31; *Mennings v Commonwealth* (Mass.) 17 Pick. 80; *Atty. Gen. v Brown*, 1 Wis. 513.

⁵⁷ *In re Const. Election of Barver*, 86 Pa. St. 392. See also *Bethlehem v Watertown*, 51 Conn. 490.

⁵⁸ *State v Smith*, 63 Vt. 201, 22 Atl. 604.

⁵⁹ Sedgwick—Stat. Const. (2nd Ed.) 31.

⁶⁰ *State v Smith*, 67 Me. 328; *Hurford v Omaha*, 4 Neb. 336; *Bladen v Philadelphia*. 60 Pa. St. 464.

Frequently, an affirmative statute may imply a negative.⁶¹ This is the case where an act is to be done in a certain manner,⁶² or where the intent is to prescribe the only rule to be followed,⁶³ or where a right is created and a remedy is provided for it.⁶⁴

§ 76. **Permissive, Prohibitive and Preceptive Statutes.**—While the language used in permissive statutes may be of the same tenor as that used in directory statutes, there is a definite difference between the two.⁶⁵ A permissive statute, however, may be defined as one which allows certain acts to be done without commanding that they be performed.⁶⁶ It confers a privilege or license which the beneficiary may exercise or not at his own pleasure or option.⁶⁷ A prohibitive statute, on the other hand, is one which forbids the doing of certain things, particularly those which are injurious to the rights of others, or of the public.⁶⁸ And a preceptive statute commands certain acts and regulates the form or manner of their performance.⁶⁹

§ 77. **Prospective and Retrospective Acts.**⁷⁰—A statute which operates upon acts and transactions which have not occurred when the statute takes effect, that is, which regulates the future, is a prospective statute.⁷¹ On the other hand, a retrospective or retro-

⁶¹ *Smith v Stevens*, 10 Wall. (U.S.) 321; *Watkins v Wassell*, 20 Ark. 410; *Burgoyne v Supervisors*, 5 Calif. 22; *New Haven v Whitney*, 36 Conn. 373; *District v Dubuque*, 7 Iowa 262; *Childs v Smith* (N.Y.) 55 Barb. 45; *Uncas Nat. Bank v Pith*, 23 Wis. 339.

⁶² See cases under note 61, *ibid*.

⁶³ *Riggs v Brewer*, 64 Ala. 282; *Sacramento v Bird*, 15 Calif. 294; *Swann v Buck*, 40 Miss. 268; *In re Spring Street*, 112 Pa. St. 258.

⁶⁴ *Smith v Lockwood*, 13 Barb. 209; *Conwell v Hagerstown Canal*, 2 Ind. 588; *Ham v Steamboat Hamburg*, 2 Iowa 460; *Thurston v Prentiss*, 1 Mich. 193; *State v Corwin*, 4 Mo. 609; *Bailey v Bryan*, 3 Jones (N.C.) 347.

⁶⁵ See *infra*, Chapt. XXIV, for further treatment of acts of this type.

⁶⁶ *Dwarris*, 74. An outstanding example of this type of statute, is that which enables certain persons to make a will.

⁶⁷ *Rockwell v Clark*, 44 Conn. 534.

⁶⁸ *Dwarris*, 74.

⁶⁹ *Dwarris*, 74.

⁷⁰ For further treatment of this subject, see *infra*, Chapt. XXV, § 277, et seq.

⁷¹ *Dwarris*, 74.

active law is one which takes away or impairs vested rights acquired under existing laws, or creates new obligations and imposes new duties, or attaches new disabilities in respect of transactions already past.⁷²

§ 78. Repealing⁷³ and Amendatory⁷⁴ Acts.—A statute which revokes or terminates another statute is a repealing act. This revocation or repeal may be achieved by express language or by implication. Acts, or statutes of this character play an important part in legislation, and are treated in considerable detail in a separate chapter hereafter.

Amendatory statutes are sometimes nearly synonymous with curative acts so far as effect is concerned, since they are sometimes enacted to serve the same purpose.⁷⁵ Yet their scope is more comprehensive. They may be defined as those statutes which make an addition to or operate to change the original law so as to effect an improvement therein, or to more effectively carry out the purposes for which the original law was passed.⁷⁶ Strictly speaking, however, an amendatory act is not regarded as an independent act.⁷⁷ All or part of the old act is permitted to remain.⁷⁸ But where a section of a statute is amended, the original ceases to exist and

⁷² *Sturges v Carter*, 114 U.S. 511, 5 S.Ct. 1014, 29 L.Ed. 240; *British Am. Assur. Co. v Colo. R. Co.*, 52 Colo. 589, 125 Pac. 508, 125 Pac. 1135; *International Mort. Co. v Henry*, 139 Kan. 154, 30 Pac. (2) 311; *Simpson v City Sav. Bank*, 56 N.H. 466; *Hamilton County v Rasche*, 50 Ohio St. 103, 33 N.E. 408, 19 L.R.A. 584; *Clark v Wadden*, 34 S.D. 550, 149 N.W. 424; *Stewart v Vanderbilt*, 34 W.Va. 524, 12 S.E. 736, 12 L.R.A. 50.

⁷³ For further treatment, see *infra*, Chapt. XIV, § 133 et seq. and Chapter XXVIII, § 307, et seq.

⁷⁴ Amendatory acts are sometimes called amendments. For further treatment, see *infra*, Chapt. XII, § 115, et seq., and Chapter XXVII, § 302, et seq.

⁷⁵ See § 73, *supra*, for definition of curative statutes.

⁷⁶ *O'Pry v U.S.*, 249 U.S. 323, 63 L.Ed. 626, 39 S.Ct. 305; *People v Perkins*, 56 Colo. 17, 137 Pac. 55; *Kelly v Laing*, 259 Mich. 212, 242 N.W. 891.

⁷⁷ *Walsh v State*, 142 Ind. 357, 41 N.E. 65, 33 L.R.A. 392.

⁷⁸ See *People v Perkins*, 56 Colo. 17, 137 Pac. 55. Also see *Kelly v Laing*, 259 Mich. 212, 242 N.W. 891.

the new section supersedes it and becomes a part of the law⁷⁹ just as if the amendment had always been there.⁸⁰ Nevertheless, from the standpoint of ultimate effect, an amendment and a repeal have a great deal in common.

⁷⁹ U.S. v LaFrance, 282 U.S. 568, 75 L.Ed. 551, 51 S.Ct. 278; People v Weitzel, 201 Calif. 601, 225 Pac. 792, 52 A.L.R. 811; Henry v McKay, 164 Wash. 526, 3 Pac. (2) 145, 77 A.L.R. 1027.

⁸⁰ Blair v Chicago, 201 U.S. 400, 50 L.Ed. 801, 26 S.Ct. 427; State v Adams Express Co. (Ind.) 85 N.E. 337; State v Massey, 103 N.C. 356, 9 S.E. 632, 4 L.R.A. 308; Stonega Cake Co. v Southern Steel Co., 123 Tenn. 428, 131 S.W. 988; Utah University v Richards, 20 Utah 457, 59 Pac. 96.

CHAPTER VIII

SPECIAL, LOCAL AND GENERAL LAWS

- § 79. In General.
- § 80. Constitutional Provisions, Generally.
- § 81. General Laws.
- § 82. Classification or Subject Matter.
- § 83. Prohibition of Special and Local Laws Where a General Law Has Been or Can Be Made Applicable.
- § 84. Amendments and Curative Acts.
- § 85. Predominating Subjects Concerning Which Local and Special Laws are Prohibited.

§ 79. **In General.**—We have already defined general, special and local laws, and indicated that substance and practical operation rather than mere form or the language used, will determine whether a statute is special or general.¹

§ 80. **Constitutional Provisions Generally.**²—Frequently, the enactment of special and local laws is prohibited by constitutional provisions. Such provisions are of relatively recent origin.³ They originated as an effort to prevent the abusive use of statutes of this

¹ See §§ 69 and 70, *supra*. And in determining whether a law is general or local or special, the court will consider the entire act, with surrounding circumstances, reasons for its passage, and the purposes to be accomplished. *Handy v Johnson*, 51 Fed. (2) 809. The court will not look beyond the act itself, and mere suspicion that it rests on considerations of local needs, is not sufficient. *Walden v Montgomery*, 214 Ala. 409, 108 So. 231. A statute should not be held local where by giving its terms a reasonable and fair construction, it may be interpreted as a general law and its constitutionality thereby sustained. *State ex rel Conrad v Bd. of Revenue*, 231 Ala. 18, 163 So. 345. And in determining whether an act is local or special, its operation and effect rather than its form governs. *Bollinger v Watson*, 187 Ark. 1044, 63 S.W. (2) 642. Also see *Ness v Ennis*, 162 Md. 529, 160 Atl. 8; *State v Speakes*, 144 Miss. 25, 109 So. 129. But see *Graeff v Schlottman*, 287 Pa. 342, 135 Atl. 308, rev. 17 Pa. Super. 387, that good faith in classification is the test of whether the statute violates the constitutional inhibition.

² Apparently, all but four states have some sort of constitutional restriction upon local and special legislation—Conn., Mass., N.H., and Vt. The constitution of the United States contains no restriction.

³ Cloe, L. H. and Marcus, Sumner—Local and Special Legislation, 24 Ky. L.J. 351, 355 (1936).

type for personal advantage.⁴ They usually provide that all laws of a general nature shall have a uniform operation everywhere within the state.⁵ They may also forbid the enactment of special laws on certain subjects,⁶ particularly those pertaining to granting divorces, moving county seats, and creating corporations, and especially where a general law thereon could be enacted.⁷ Some also provide that local laws shall not be passed by indirection or by the partial repeal of a general law.⁸ And so, from the foregoing, it is

⁴ *Michigan Millers Mut. F. Ins. Co. v McDonough*, 358 Ill. 575, 193 N.E. 662; *State v Brown*, 97 Minn. 402, 106 N.W. 477; *State v Dorr*, 145 Mo. 466, 41 S.W. 1094, 46 S.W. 976; *Ayars' Appeal*, 122 Pa. St. 266, 16 Atl. 356, 2 L.R.A. 577. See also *Armstrong v State*, 170 Ind. 188, 84 N.E. 3; *In re Henneberger*, 155 N.Y. 420, 50 N.E. 61, 42 L.R.A. 132; *State v Ellet*, 47 Ohio St. 90, 23 N.E. 931; *Kimball v Rosendale*, 42 Wis. 407. And see *Cloe, L. H.*, and *Marcus Sumner—Special and Local Legislation*, 24 Ky. L.J. 351, 356 (1936).

⁵ Ind. Art. IV, § 23; Fla. Art. III, § 21; Iowa Art. III, § 3; Minn. Art. IV, § 34; Nev. Art. IV, § 21; Ohio Art. II, § 26; Calif. Art. I, § 11; Ga. Art. I, § 4; Kan. Art. II, § 27; Okla. Art. V, § 59.

⁶ Ala. Const. Art. IV, § 104; Ariz. Art. IV, § 11; Ark. Art. V, § 24; Calif. Art. IV, § 25; Colo. Art. V, § 25; Dela. Art. II, §§ 18, 19; Fla. Art. III, § 20; Ga. Art. II, § 7, par. 18; Idaho Art. III, § 19; Ill. Art. IV, § 22; Ind. Art. IV, § 22; Iowa Art. II, § 30; Ky., § 59; La. Art. IV, § 4; Minn. Art. IV, § 33; Md. Art. III, § 33; Miss. Art. IV, § 90; Mo. Art. VI, § 53; Mont. Art. IV, § 26; Neb. Art. III, § 18; Nev. Art. IV, § 20; N.J. Art. IV, § 7; N.M. Art. IV, § 24; N.Y. Art. III, § 18; N.C. Art. II, §§ 10, 11; N.D. Art. II, § 69; Okla. Art. V, § 46; Ore. Art. IV, § 23; Pa. Art. III, § 7; S.C. Art. III, § 46; S.D. Art. III, § 23; Tex. Art. II, § 56; Utah Art. IV, § 26; Va. Art. IV, § 63; Wash. Art. II, § 28; W.Va. Art. VI, § 39; Wis. Art. IV, § 31; Wyo. Art. III, § 27.

⁷ Ariz. Art. IV, § 11; Ark. Art. V, § 25; Calif. Art. IV, § 25; Colo. Art. V, § 25; Ill. Art. IV, § 23; Ind. Art. IV, § 23; Ky., § 59; Md. Art. III, § 33; Mich. Art. V, § 30; Minn. Art. IV, § 33; Miss. Art. IV, § 87; Mo. Art. IV, § 33; Mont. Art. V, § 26; Neb. Art. III, § 18; Nev. Art. IV, § 21; N.M. Art. IV, § 24; N.D. Art. II, § 70; Okla. Art. V, § 59; S.C. Art. III, § 34; S.D. Art. III, § 23; Tex. Art. III, § 56; Utah Art. IV, § 26; Wyo. Art. III, § 27. Also see Fla. Art. III, § 25.

⁸ *Columbia Trust Co. v Lincoln Institute*, 138 Ky. 804, 129 S.W. 113; *Henderson v Koenig*, 168 Mo. 356, 68 S.W. (2) 72, 57 L.R.A. 659; *State v Ott*, 144 La. 948, 81 So. 435; *State ex rel Inter-Insurance Auxiliary v Revelle*, 257 Mo. 529; *Bearce v Fairview Township*, 9 Pa. Co. 342. See also *State v Higgins*, 51 S.C. 51, 28 S.E. 15, 38 L.R.A. 561; *Hunter v Connor*, 153 Tenn. 258, 277 S.W. 71.

apparent that the constitutional provisions are lacking in uniformity.⁹

Such constitutional provisions are, however, usually mandatory.¹⁰ Consequently, any act which violates them, will be held invalid,¹¹ although, of course, in the absence of any constitutional prohibition, local laws may be enacted.¹² Indeed, local or special statutes frequently provide the most practical and effective means for taking care of the different needs of different parts of a state and of individuals under exceptional circumstances.¹³ But even where local or special laws are permissible, they cannot be enacted, as a general rule, unless proper notice has been given of the intention to seek such enactment,¹⁴ largely in order that those affected adversely may have ample opportunity of knowledge.

§ 81. General Laws.—As we have suggested above,¹⁵ many constitutions require the uniform operation of all laws of a general nature. This requirement, of course, constitutes a prohibition or limitation upon the power to enact local or special legislation. Moreover, it is often difficult to determine whether a law is general or special, and particularly whether it operates uniformly throughout the entire state, although the existence of some un repealed local

⁹ For an attempted classification, see Cloe, L. H., and Marcus, S.—*Special and Local Legislation*, 24 Ky. L.J. 351 (1936).

¹⁰ *State ex rel v Hamilton*, 312 Mo. 157, 279 S.W. 33. Also see cases in note 11, *infra*. But see *Richardson v Board of Education*, 72 Kan. 629, 84 Pac. 538; *State v Carter*, 30 Wyo. 22, 215 Pac. 477. Nor will the existence of a moral obligation authorize the enactment of a special or local law in violation of the constitution. *Board of Comrs. v. Wood*, 133 Ark. 1082, 40 S.W. (2) 435.

¹¹ *Ex parte Falk*, 42 Ohio St. 683; *State ex rel v Supervisors*, 25 Wis. 339.

¹² *Davis v State*, 68 Ala. 58; *Harper v Galloway*, 58 Fla. 255, 51 So. 226; *Indianapolis v Newin*, 151 Ind. 136, 47 N.E. 525, 51 N.E. 80; Ky. *Live Stock Breeders v Hager*, 120 Ky. 125, 85 S.W. 739; *Adams v Howe*, 14 Mass. 340; *State v Brown*, 97 Minn. 402, 106 N.W. 477; *State v Griffin*, 69 N.H. 1, 39 Atl. 260, 41 L.R.A. 177; *Sharpless v Philadelphia*, 21 Pa. St. 147; *Brodhead v Milwaukee*, 19 Wis. 624.

¹³ *State v Brown*, 97 Minn. 402, 106 N.W. 477; *Crockett County v Walters (Tenn.)* 95 S.W. (2) 305 (county roads).

¹⁴ See § 38, *supra*.

¹⁵ See § 80, note 5, *supra*.

law, which prevents a later statute from having a general effect does not make the new law a special act.¹⁶

It may be stated, as a general rule, that the constitutional requirement that a law must operate uniformly, is met if it applies to, and operates uniformly on all the members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law.¹⁷ Universality, however, is not an indispensable test, nor it is necessary that a large number of persons

¹⁶ *Kelleher v Burlingame* (Ark.) 110 S.W. (2) 1065.

¹⁷ *U.S. v Mullendore*, 72 Fed. (2) 286; *Title, etc., Co. v Kerrigan*, 150 Calif. 289, 88 Pac. 356; *Clendaniel v Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036; *Perkins v Cook County*, 271 Ill. 449, 111 N.E. 580; *People v Graham*, 301 Ill. 446, 134 N.E. 57; *People ex rel Clarke v Jarecke*, 363 Ill. 180, 1 N.E. (2) 855; *State v Smith*, 158 Ind. 543, 63 N.E. 214, 64 N.E. 18, 63 L.R.A. 116; *Sarlls v State*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; *King v Common.*, 194 Ky. 143, 238 S.W. 373, 22 A.L.R. 535; *State v Des Moines*, 96 Iowa 521, 65 N.W. 818, 31 L.R.A. 186; *People v Brazee*, 183 Mich. 259, 149 N.W. 1053; *State v Ramsey County*, 48 Minn. 236, 51 N.W. 112; *Ex Parte Fritz*, 86 Miss. 210, 38 So. 722; *Toombs v Sharkey*, 140 Miss. 676, 106 So. 273; *O'Connor v St. Louis Transit Co.*, 198 Mo. 622, 97 S.W. 150; *Worthington v Dist. Court*, 37 Nev. 212, 142 Pac. 230; *State v Griffin*, 69 N.H. 1, 39 Atl. 260, 41 L.R.A. 177; *Wanser v Hoos*, 60 N.J.L. 482, 38 Atl. 449; *St. John v Andrews Institute*, 191 N.Y. 254, 83 N.E. 981; *State v Moore*, 104 N.C. 714, 10 S.E. 143; *Edmonds v Herbrandson*, 2 N.D. 270, 50 N.W. 970, 14 L.R.A. 725; *State v Nelson*, 51 Ohio St. 88, 39 N.E. 22, 26 L.R.A. 317; *Ladd v Holmes*, 40 Ore. 167, 66 Pac. 714; *Commonwealth v Macferron*, 152 Pa. St. 244, 25 Atl. 556, 19 L.R.A. 568; *Summerville v Pressley*, 33 S.C. 56, 11 S.E. 545, 8 L.R.A. 854; *Nixon v Reid*, 8 S.D. 507, 67 N.W. 57, 32 L.R.A. 315; *Gulf, etc., R. Co. v Ellis* (Tex.) 18 S.W. 723, 7 L.R.A. 286; *State v Sharpless*, 31 Wash. 191, 71 Pac. 737. A statute applicable to cities of a general classification as determined by population is a general statute and not special or local. *People ex rel Nicholson v Board of Trustees*, 281 Ill. Ap. 394. Also see *Groves v Board of Comrs.* (Ind.) 199 N.E. 137; *Herold v Talbott*, 261 Ky. 634, 88 S.W. (2) 303; *Vrooman v City of St. Louis* (Mo.) 88 S.W. (2) 189. And the test for the validity of a general law based on population is whether population has a reasonable relation to the purpose of the statute. *City of Dearborn v Board of Supr's*, 275 Mich. 151, 266 N.W. 304. Also see *State ex rel Bales v Hamilton County* (Tenn.) 95 S.W. (2) 618. Population as shown by federal census is a fair basis for determining population. *Dixon v State* (Ala. Ap.) 167 So. 340, cert. den. 167 So. 349. Also see *Groves v Board of Comrs.* (Ind.) 199 N.E. 137; *People ex rel Nicholson v Board of Trustees*, *ibid.* Population and assessed valuation may also be the basis of classification. *State ex rel White v Board of Comrs.* (Kan.) 39 Pac. (2) 286.

comprise the class.¹⁸ But the classification must be reasonable,¹⁹ and germane to the purpose of the law,²⁰ for even a classification proper for one purpose might be improper for another.²¹ To be proper, it must be based on a reasonable and tangible distinction,²² and operate the same on all parts of the state under the same con-

¹⁸ *Grable v Childers* (Okla.) 56 Pac. (2) 357. Even one member in a class will suffice. *People ex rel Nelson v Dennhart*, 354 Ill. 540, 188 N.E. 464; *Board of Education v Borgen* (Minn.) 256 N.W. 894.

¹⁹ *Title, etc., Co. v. Kerrigan*, 150 Calif. 289, 88 Pac. 356; *Kennedy v Meara*, 127 Ga. 68, 56 S.E. 243; *Strong v Dignan*, 207 Ill. 385, 69 N.E. 909; *Hunt v Rosenbaum*, 355 Ill. 504, 189 N.E. 907; *Consumers Gas Trust Co. v Harless*, 131 Ind. 446, 29 N.E. 1062, 15 L.R.A. 505; *State v Bridgman*, 117 Minn. 186, 134 N.W. 496; *O'Connor v St. Louis Transit Co.*, 198 Mo. 622, 97 S.W. 150; *Wanser v Hoos*, 60 N.J.L. 71, 38 Atl. 449; *Worthington v Dist. Court*, 37 Nev. 212, 142 Pac. 230; *People v Dunn*, 157 N.Y. 528, 52 N.E. 572, 43 L.R.A. 247; *Edmonds v Herbrandson*, 2 N.D. 270, 50 N.W. 970, 14 L.R.A. 725; *State v Sopher*, 25 Utah 318, 71 Pac. 482; *State ex rel Cooley v Thrasher*, 130 Ohio St. 434, 200 N.E. 468; *State v Sharpless*, 31 Wash. 191, 71 Pac. 737; *Julien v Model Building Assn.*, 116 Wis. 79, 92 N.W. 561, 61 L.R.A. 668; *State ex rel Welsh v Darling*, 216 Iowa 553, 246 N.W. 390, 88 A.L.R. 218; *Davis v Wiemeyer*, 124 Ohio St. 103, 177 N.E. 37, 77 A.L.R. 1280.

²⁰ *Toombs v Sharkey*, 140 Miss. 676, 106 So. 273; *Clark v State*, 169 Miss. 369, 152 So. 820; *Morgan v Dornbrook*, 188 Wis. 426, 206 N.W. 55.

²¹ *In re Wyoming Street*, 137 Pa. 494.

²² *Chicago, etc., R. Co. v Cutts*, 94 U.S. 155, 24 L.Ed. 94; *State ex rel Covington v Thompson*, 142 Ala. 98, 38 So. 679; *Leep v St. Louis R. Co.*, 58 Ark. 407, 25 S.W. 75; *Ex parte Burke*, 160 Calif. 300, 116 Pac. 755; *Robertson v People*, 20 Colo. 279, 38 Pac. 326; *State v Daniel*, 87 Fla. 270, 99 So. 804; *Badger v State*, 154 Ga. 443, 114 S.E. 635; *Chambers v McCollum*, 47 Idaho 74, 272 Pac. 707; *Greene v L. Fish Furniture Co.*, 272 Ill. 148, 111 N.E. 725; *Pennsylvania Co. v State*, 142 Ind. 428, 41 N.E. 937; *Midwest Mut. Ins. Co. v DeHoet*, 208 Iowa 49, 222 N.W. 548; *McBride v Reitz*, 19 Kan. 123; *Board of Education v Board of Education*, 264 Ky. 245, 94 S.W. (2) 687; *Festervand v Laster*, 15 La. Ap. 159, 130 So. 634; *State v Speakes*, 144 Miss. 125, 109 So. 129; *Allen v Kennard*, 81 Neb. 289, 116 N.W. 63; *State v Bergen*, 53 N.J.L. 108, 20 Atl. 762; *State v Sherman*, 104 Ohio St. 317, 135 N.E. 625; *Winston v Moore*, 244 Pa. 447, 91 Atl. 520; *Texas Southern R. Co. v Harle*, 101 Tex. 170, 105 S.W. 1107; *Milwaukee County v Isenring*, 109 Wis. 9, 85 N.W. 131.

ditions or circumstances.²³ It must not be discriminatory as to any persons or classes similarly situated.²⁴ If the classification is arbitrary, or capricious, of course, it violates the constitutional provision.²⁵ Slight inequality in practice, however, will not be sufficient to invalidate the law,²⁶ for the true test of uniformity of operation depends on what may be done under the statute rather than what is done under it.²⁷ Similarly, mere limitation as to the time of the duration of a statute will not make it a local or special law.²⁸ But

²³ *Rathbone v Kiowa County*, 73 Fed. 395; *Ex parte King*, 157 Calif. 161, 106 Pac. 578; *Cooper v Rollins (Ga.)* 110 S.E. 726; *Big Wood Canal Co. v Chapman*, 45 Idaho 380, 263 Pac. 45; *People v Cobb*, 343 Ill. 78, 174 N.E. 885; *Hirth-Krause Co. v Cohen*, 177 Ind. 1, 97 N.E. 1; *Midwest Mut. Ins. Assn. v DeHoet*, 208 Iowa 49, 222 N.W. 548; *Chaput v Demars*, 120 Kan. 273, 243 Pac. 311, 244 Pac. 1042; *Stees v Bergmeier*, 91 Minn. 513, 98 N.W. 648; *State v Speed*, 183 Mo. 186, 81 S.W. 1260; *Allen v Kennard*, 81 Neb. 289, 116 N.W. 63; *State v Griffin*, 69 N.H. 1, 39 Atl. 260, 41 L.R.A. 177; *Loucks v Bradshaw*, 56 N.J.L. 1, 27 Atl. 939; *Picton v Cass County*, 13 N.D. 242, 100 N.W. 711; *Saviers v Smith*, 101 Ohio St. 132, 128 N.E. 269; *Roberts v Ledgerwood*, 134 Okla. 152, 272 Pac. 448; *Dane v Coal Tp.*, 19 Pa. Dist. 983; *State v Standford*, 24 Utah 148, 66 Pac. 1061; *State v Braxton County Court*, 60 W.Va. 339, 55 S.E. 332, err. dis. 208 U.S. 192, 52 L.Ed. 450, 28 S.Ct. 275; *State v A. H. Reed Co.*, 33 Wyo. 387, 240 Pac. 208.

²⁴ *Evans v Shanklin (Calif. Ap.)* 60 Pac. (2) 554. And see *Crockett County v Walters (Tenn.)* 95 S.W. (2) 305.

²⁵ *Evans v Shanklin (Calif. Ap.)* 60 Pac. (2) 554 (parties plaintiff in wrongful death action); *State v Shepherd*, 84 Fla. 206, 93 So. 667; *State ex rel Blink v Cooke (Minn.)* 262 N.W. 163; *State ex rel Mueller Baking Co. v Calvird (Mo.)* 92 S.W. (2) 184; *Bexar County v Tynan (Tex. Com. Ap.)* 97 S.W. (2) 467, affd. 69 S.W. (2) 193. Also see *State ex rel Hollaway v Knight*, 323 Mo. 1241, 21 S.W. (2) 767.

²⁶ *State v Merrill*, 218 Ala. 149, 117 So. 473; *People v Nellis*, 249 Ill. 12, 94 N.E. 165; *Indianapolis Traction Co. v Kinney*, 171 Ind. 612, 85 N.E. 954; *Eckerson v Des Moines*, 137 Iowa 452, 115 N.W. 177; *State v Corson*, 67 N.J.L. 178, 50 Atl. 780; *Waterloo Woolen Mfg. Co. v Shanahan*, 128 N.Y. 345, 28 N.E. 345; *Steele, Etc., Co. v Miller*, 92 Ohio St. 115, 110 N.E. 648; *Murphy v Landrum*, 76 S.C. 21, 56 S.E. 850; *Darnell v Shopard*, 156 Tenn. 544, 3 S.W. (2) 661.

²⁷ See *Salt Lake City v Utah Light Co.*, 45 Utah 50, 142 Pac. 1067.

²⁸ *People v Wright*, 70 Ill. 388; *Cincinnati St. R. Co. v Horstman*, 72 Ohio St. 93, 73 N.E. 1075. See Note: 4 Ann. Cas. 659.

the exemption of one or more counties from its operation may make the law local.²⁹

§ 82. **Classification of Subject Matter.**—In many instances, therefore, the validity of a general law will depend upon the basis for the classification of the subject matter to which it applies. We have already stated that the classification must be a reasonable one.³⁰ Moreover, it must be founded upon substantial distinctions, inherent in the subject matter, which make one class really different from another;³¹ and the characteristics which form the basis of the classification must be germane to the purpose of the law.³² Thus, an act regulating the size and weight of trucks, trailers, and semi-trailers, does not violate the constitutional inhibition against local laws.³³ Yet, the classification does not necessarily need to be scientific,³⁴ logical,³⁵ exact,³⁶ or consistent.³⁷ And in classifying, the legislature may properly exercise a broad or wide

²⁹ *Tendall v Searan* (Ark.) 90 S.W. (2) 476; *In re Slaughter*, 12 Fed. Sup. 206 ("in a locality"). Legislation may be local even though the interests affected outrun the bounds of locality. *LaRosca v Flynn*, 257 N.Y. 5, 177 N.E. 290.

³⁰ See *supra*, § 81. And see *Cloe, L. H., and Marcus, S.*—Special and Local Legislation, 24 Ky. L.J. 251, 375 (1936).

³¹ *U.S. v Mullendore*, 74 Fed. (2) 286; *State v Cooley*, 56 Minn. 540, 58 N.W. 150. See also *Bennett v Nichols*, 9 Ariz. 138; *Franchise Motor Freight Assn. v Seavey*, 196 Calif. 77, 235 Pac. 1000; *People v Weis*, 275 Ill. 581, 114 N.E. 331; *Joseph Trener Corp. v McNeil*, 363 Ill. 559, 2 N.E. (2) 929, 104 A.L.R. 1435, *affd.* 57 S.Ct. 139; *Kelly v Finney* (Ind.) 194 N.E. 157; *State ex rel Scott v Peak* (Ind.) 2 N.E. (2) 793; *State v Speakes*, 114 Miss. 125, 109 So. 129; *Vermont L. & T. Co. v Whithed*, 2 N.D. 82, 49 N.W. 318; *Roberts v Ledgerwood*, 134 Okla. 152, 272 Pac. 448; *O'Brien v Amerman*, 112 Tex. 254, 247 S.W. 270.

³² *State v Cooley*, 56 Minn. 540, 58 N.W. 150. See also *State v Sullivan*, 95 Fla. 191, 116 So. 255; *Jensen v Wilton*, 295 Ill. 294, 129 N.E. 133; *State v Common. School Dist.*, 180 Minn. 44; *State v Hamilton*, 20 N.D. 592, 129 N.W. 916.

³³ *State ex rel Daniel v John P. Nutt Co. (S.C.)* 185 S.E. 25, *cert. den.* 56 S.Ct. 668.

³⁴ *People v Callicott*, 322 Ill. 390, 153 N.E. 688; *Jones v Russell*, 224 Ky. 390, 6 S.W. (2) 460.

³⁵ *Stewart v Brady*, 300 Ill. 425, 133 N.E. 310.

³⁶ *Jones v Russell*, 224 Ky. 390, 6 S.W. (2) 460; *Cleveland v Davis*, 95 Ohio St. 52, 115 N.E. 503.

³⁷ *Stewart v Brady*, 300 Ill. 425, 133 N.E. 310.

discretion,³⁸ although it appears that inquiry may be made as to the good faith of the legislature.³⁹

In determining whether a law is public, general, special or local, the court should look to its substance and practical operation rather than to its title, form, or phraseology.⁴⁰ Substance rather than form is the determining factor.⁴¹

§ 83. Prohibition of Special and Local Laws Where a General Law Has Been or Can Be Made Applicable.—Some constitutions expressly prohibit the enactment of a local or special law where there is a general law already in existence relating to the same subject matter.⁴² But, of course, the prohibition does not apply where the pre-existing general law does not deal with the same subject matter. In fact, some decisions go so far as to hold the prohibition inapplicable if the general law does not adequately deal with the particular matter made the subject of special or local legislation.⁴³

In some states, the constitutional prohibition provides that no special or local law shall be enacted if a general law can be made

³⁸ *Martin v Sacramento County Super. Court*, 194 Calif. 93, 227 Pac. 762; *Baker v Gillan*, 68 Neb. 368, 94 N.W. 618; *Davy v McNeill*, 31 N.M. 7, 240 Pac. 482; *State v Nolan*, 161 Tenn. 293, 30 S.W. (2) 601. And see *People v Monroe*, 349 Ill. 270, 182 N.E. 439; *Gunderson v Williams*, 175 Minn. 316, 221 N.W. 231; *Hawkins v Smith*, 242 Mo. 688, 147 S.W. 1042. But note *State v Wiggins*, 187 Ind. 159, 118 N.E. 684.

³⁹ *Fountain Park Co. v Hensler*, 199 Ind. 95, 155 N.E. 465. Also see *Dixon v State* (Ala. Ap.) 167 So. 340, cert. den. 167 So. 349.

⁴⁰ *Bexar County v Tyman* (Tex. Com.Ap.) 97 S.W. (2) 467, aff. 69 S.W. (2) 193.

⁴¹ *Ravitz v Steurele*, 257 Ky. 108, 77 S.W. (2) 360.

⁴² *Downs v State*, 158 Ga. 669, 124 S.E. 166; *Harbin v Holcomb*, 181 Ga. 800, 184 S.E. 603; *Westminster v Consolidated Utilities Co.*, 132 Md. 374, 103 Atl. 1008; *Souder v Commonwealth*, 29 Pa. Dist. 254. See also *State v Bowles*, 217 Ala. 458, 116 So. 662.

⁴³ *State v Bowles*, 217 Ala. 458, 116 So. 662; *Macon v Samples*, 167 Ga. 150, 145 S.E. 57; *Philadelphia County v Com.*, 270 Pa. 353, 113 Atl. 661.

applicable.⁴⁴ Whether a general law can be made applicable is usually regarded as a legislative question.⁴⁵ Hence, the judgment of the legislature is conclusive and will not be interfered with by the courts,⁴⁶ unless it is clearly in disregard of the constitutional requirement,⁴⁷ although there is authority to the contrary.⁴⁸ And

⁴⁴ *Union Sewer Pipe Co. v Connelly*, 99 Fed. 354, aff. 184 U.S. 540, 46 L.Ed. 679, 22 S.Ct. 431; *Bloss v Lewis*, 109 Calif. 493, 41 Pac. 1081; *Ex parte Scaranino* (Calif.) 60 Pac. (2) 288; *Heckler v Conter* (Ind.) 187 N.E. 878; *Cooper v Mills County*, 69 Iowa 350, 28 N.W. 633; *McGregor v Baylies*, 19 Iowa 43; *Wyandotte County v Kansas City*, 112 Kan. 639, 212 Pac. 70; *Stratman v Com.*, 137 Ky. 500, 125 S.W. 1094; *Detroit v Engel*, 202 Mich. 536, 168 N.W. 462; *Mulloy v Wayne County Supervisors*, 246 Mich. 632, 225 N.W. 615; *Ashbrook v Schaub*, 160 Mo. 107, 60 S.W. 1085; *State v Spellmire*, 67 Ohio St. 77, 65 N.E. 619; *Grady County v Hammerly*, 85 Okla. 53, 204 Pac. 445; *Sirrime v State*, 132 S.C. 241, 128 S.E. 172; *State ex rel Coleman v Lewis*, 181 S.C. 10, 186 S.E. 625; *Openshaw v Halfin*, 24 Utah 426, 68 Pac. 138. And see *In re House Roll*, 31 Neb. 505, 48 N.W. 275.

⁴⁵ *Guthrie National Bank v Guthrie*, 173 U.S. 528, 43 L.Ed. 796, 19 S.Ct. 513; *St. Louis, etc., R. Co. v Jackson County*, 103 Ark. 127, 145 S.W. 892; *Rhinehart v Denver R. Co.* (Colo.) 158 Pac. 149; *Stockton v Powell*, 29 Fla. 1, 10 So. 688; *Herschbach v Kaskaskia Sanitary Dist.*, 265 Ill. 388, 106 N.E. 942; *Mode v Measley*, 143 Ind. 306, 42 N.E. 727; *Wichita v Burleigh*, 36 Kan. 34, 12 Pac. 332; *Hall v Bray*, 51 Mo. 288; *People v Bowen*, 21 N.Y. 517; *Western v Ryan*, 70 Neb. 211, 97 N.W. 347; *Edmonds v Herbrandson*, 2 N.D. 270, 50 N.W. 970, 14 L.R.A. 725; *Addington v Canfield*, 11 Okla. 204, 66 Pac. 355; *Oakcliff v State* (Tex.) 79 S.W. 24; *Woodall v Darst*, 71 W.Va. 350, 77 S.E. 264. A local or special law cannot be upheld on the theory that the legislature conscientiously determined that a general law could not be made applicable. *Heckler v Conter*, 206 Ind. 376, 187 N.E. 878.

⁴⁶ In several states, express constitutional provisions make this a question solely for legislative determination. N.J. Art. IV, § 7; N.Y. Const. Art. III, § 18; Va., § 64.

⁴⁷ See *Wheeler v Herbert*, 152 Calif. 224, 92 Pac. 353; *Van Cleve v Pas-saic Valley Sewerage Commrs.*, 71 N.J.L. 183, 58 Atl. 571. And note *Fairfield v Huntington*, 23 Ariz. 528, 205 Pac. 814.

⁴⁸ *Ex parte Pritz*, 9 Iowa 30; *Quilci v Strosnider*, 34 Nev. 9, 115 Pac. 177; *Prince George County v Baltimore & Ohio R. Co.*, 113 Md. 179, 77 Atl. 433; *Pell v Newark*, 40 N.J.L. 71; *Columbia v Smith* (S.C.) 89 S.E. 1028. Some constitutions expressly make this a matter for judicial determination. Kan. Art. II, § 7, Mich. Art. V, § 30, Minn. Art. IV, § 3, Mo. Art. IV, § 63. And see *Anderson v Cloud County*, 77 Kan. 921, 85 Pac. 583.

some authorities hold that the existence of a general law on the particular subject shows conclusively that a general law can be made applicable,⁴⁹ although here too there is a conflict.⁵⁰

§ 84.—Amendments and Curative Acts.—A subsequent enactment which operates to destroy the uniformity of an existing general statute will be invalid, if the constitution requires all statutes of a general nature to operate uniformly.⁵¹ The same is true with reference to amendments.⁵² Nor can a special or local law be amended in the face of a constitutional prohibition against such laws, even though the original law when enacted was in accord with the existing constitution.⁵³ Similarly, the validity of a curative statute depends upon the legislative authority to confer the powers authorized by the original act or statute.⁵⁴ Furthermore, if the curative act relates to a matter on which special legislation is prohibited, it is also void.⁵⁵ Yet a special or local law may be repealed

⁴⁹ *Leatherwood v Hill*, 10 Ariz. 16, 85 Pac. 405; *Ventura County Harbor Dist. v Ventura County*, 211 Calif. 271, 295 Pac. 6; *Gray v Crockett*, 30 Kan. 138, 1 Pac. 50; *State v Drabelle*, 258 Mo. 568, 167 S.W. 1016; *In re House Roll*, 31 Neb. 505, 48 N.W. 275; *Browne v New York City*, 241 N.Y. 96, 149 N.E. 211; *State v Spellmire*, 67 Ohio St. 77, 65 N.E. 619; *State v Dousman*, 28 Wis. 541.

⁵⁰ *St. Louis, Etc., R. Co. v State*, 97 Ark. 473; *Indianapolis v Navin*, 151 Ind. 139, 47 N.E. 525, 51 N.E. 80, 41 L.R.A. 337; *Oak Cliff v State (Tex.)* 77 S.W. 24.

⁵¹ *Omnibus R. Co. v Baldwin*, 57 Calif. 160; *Darling v Rodgers*, 7 Kan. 592; *Friend v Levy*, 76 Ohio St. 26, 80 N.E. 1036. Also see *Hunter v Conner*, 152 Tenn. 258, 277 S.W. 71. But see *Sprague v Fremont*, 6 Dak. 86, 50 N.W. 617.

⁵² *State ex rel Peck v Riodan*, 24 Wis. 484; *Zeigler v Gaddis*, 44 N.J.L. 363.

⁵³ *Gregory v Cockrell*, 179 Ark. 719, 18 S.W. (2) 362; *DeHay v Commissioner*, 66 S.C. 299, 44 S.E. 790.

⁵⁴ And see *West Side Belt R. Co. v Pittsburg Const. Co.*, 219 U.S. 92, 31 S.Ct. 196, 55 L.Ed. 107; *McSurely v McGrew*, 140 Iowa 163, 118 N.W. 415; *Phillips v Heraty*, 147 Mich. 473, 111 N.W. 93; *Peet v East Grand Forks*, 101 Minn. 523, 112 N.W. 1005; *Hurley v Hurley*, 110 Va. 31, 65 S.E. 472.

⁵⁵ *Cole v Dorr*, 80 Kan. 251, 101 Pac. 1016. Also see Note 22 L.R.A. (N.S.) 534. But in some jurisdictions, validity will depend upon the nature of the case. *Pollock v Kansas City*, 87 Kan. 205, 123 Pac. 985; *State v Brown*, 97 Minn. 402, 106 N.W. 477. Also see *Weber v Helena*, 89 Mont. 109, 297 Pac. 455, that curative or remedial acts applying to places, things, or subjects affected by conditions to be remedied, are not prohibited as special laws.

without the repealing act being in violation of a constitutional provision against the enactment of local or special laws.⁵⁶

§ 85. Predominating Subjects Concerning Which Local and Special Laws Are Prohibited.—Sometimes constitutional provisions state expressly that no special or local law shall be enacted on certain enumerated subjects. But it is impossible to discuss the law applicable to these matters within the scope of this treatise.⁵⁷ We must content ourselves with a simple reference to such subjects—the most important of which apparently are: private rights,⁵⁸ taxation,⁵⁹ crimes,⁶⁰ franchises, privileges and immunities,⁶¹ private and municipal corporations,⁶² and judicial proceedings,⁶³ although, of course, there are many others.

⁵⁶ *People v Reiner*, 52 Calif. Ap. 747, 199 Pac. 1066; *Rogerson v Cremley*, 277 Ill. 139, 113 N.E. 119; *State v Prather*, 84 Kan. 169, 112 Pac. 289.

⁵⁷ For an enumeration, see Cloe, L. H., and Marcus, Sumner—*Special and Local Legislation*, 24 Ky. L.Rev. 351, 352 (1936). Also see 59 C.J. 739, § 327.

⁵⁸ 25 R.C.L. 826, § 74, 59 C.J. 739, § 327.

⁵⁹ 25 R.C.L. 833, § 75, 59 C.J. 775, § 364.

⁶⁰ 25 R.C.L. 833, § 80, 59 C.J. 785, § 368.

⁶¹ 25 R.C.L. 828, § 76.

⁶² 25 R.C.L. 829, § 77, 59 C.J. 744, § 333.

⁶³ 25 R.C.L. 832, § 79, 59 C.J. 777, § 365.

CHAPTER IX

PARTS OF A STATUTE

- § 86. In General.
- § 87. The Title, Generally.
- § 88. The Preamble.
- § 89. The Enacting Clause (Style of Act).
- § 90. The Purview, or Body of the Act.
- § 91. Exceptions and Provisos.
- § 92. Interpretation Clauses.
- § 93. Repealing and Saving Clauses.
- § 94. Miscellaneous Matters.

§ 86. **In General.**—Some authorities divide a statute into four parts;¹ the declaratory, the directory, the remedial, and the vindicatory. This division is correct and philosophical, but it has little practical value.² In fact, the most practical analysis, at least, for most purposes, divides the statute into the following parts: the title, the preamble, the enacting clause, the purview or body, and exceptions, provisos, interpretations, repealing and saving clauses. Although this division is not legally accurate, it does break the statute into divisions fairly logical and susceptible to easy treatment.³

§ 87. **The Title, Generally.**⁴—The title of a statute plays an important part, not only in the legislative process, but also, as will appear later, in the construction and interpretation of laws. Yet many declarations may be found to the effect that the title is no part of an act.⁵ In accord with this view, the title is simply the

¹ Sedgwick, Stat. Constr. (2nd Ed.) Ch. III, p. 38.

² Ibid.

³ Sedgwick—Stat. Const. (2nd Ed.) Ch. III, p. 38.

⁴ For further treatment, see *infra*, Chapt. X, Title and Subject Matter.

⁵ *Cohen v Barrett*, 5 Cal. 195; *Plummer v People*, 74 Ill. 361; *Bradford v Jones*, 1 Md. 351; *Comm. v Shefer*, 53 Pa. St. 71; *State v Stephenson*, 2 Bailey (S.C.) 334. Originally, neither bills nor statutes were titled. When titles were first introduced, they were merely an expression by a clerk of the legislature, or other scrivener, of his understanding of the contents or purport of the act; usually added after enactment. *Manson, C. L., The Drafting of Statute Titles* (1934) 10 Ind. L.J. 155. Also see *Hadden v The Collector*, 5 Wall. (U.S.) 107, 18 L.Ed. 518.

label or name of, or the description given to a statute by the legislature; hence an act need not necessarily have a title.⁶ But constitutional provisions in many of the states expressly require that the subject of every law be expressed in the title.⁷ As a result, the title becomes an important part of the statute; in fact, so important that it is indispensable.⁸ And added importance is given to the title, even under the common law and in the absence of such constitutional provisions, since resort can be had to it as a valuable source of assistance in ascertaining the legislative intent where such intent is doubtful.⁹

§ 88. **The Preamble.**—The preamble of a statute is simply a prefatory statement at its beginning, following the title and preceding the enacting clause, explaining or declaring the reasons and motives for, and the objects sought to be accomplished by the enactment of the statute.¹⁰ It is now seldom used, and is not an essential part.¹¹ But when used, it is an excellent aid to the construction of ambiguous statutes or statutes of doubtful meaning;¹²

⁶ *Moore v Williams*, 19 Cal. Ap. 600, 127 Pac. 509; *State ex rel Cotter v Dist. Ct.*, 49 Mont. 146, 140 Pac. 732. In England the title is no part of the statute. *Rawley v Rawley*, 1 Q.B. 466; *Powlter's case*, 11 Coke 33; *Hadden v Collector (U.S.)* 5 Wall. 107, 18 L.Ed. 518. And for title as identification of a statute, see *Kiernan v City of Portland*, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402.

⁷ The Constitutions of forty-one states contain what may be termed a title-body clause. The exceptions are: Connecticut, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, and Vermont.

⁸ *C. B. & Q. R. Co. v Smyth*, 103 Fed. 376; *Peo. v State Contract Comrs.*, 120 Ill. 322, 11 N.E. 180; *State v Burlington R. Co.*, 60 Neb. 741, 84 N.W. 254. But a joint resolution may be enacted without a title. *Constock v Davis*, 44 Calif. Ap. 275, 186 Pac. 380.

⁹ *U.S. v Palmer*, 3 Wheat (U.S.) 610; *Cohen v Barrett*, 5 Cal. 195; *Eastman v McAlpen*, 1 Ga. 157; *Peo. v Davenport*, 91 N.Y. 574; *Hines v R. R. Co.*, 95 N.C. 434; *Comm. v Gaines*, 2 Va. Cas. 172. See also *Coomber v Berks*, L.R. 9 Q.B. Div. 33; *Free v Burgoyne*, 5 B. & C. 400; *Wood v Rowcliffe*, 6 Hare 191. Also see § 206, *infra*.

¹⁰ *Mayor, etc., v Moore & Johnson (Md.)* 6 Har. & J. 375.

¹¹ *Townsend v State*, 147 Md. 624, 47 N.E. 19, 3 L.R.A. 294; *Sutherland v DeLeon*, 1 Tex. 250. See also *Gemmer v State*, 163 Ind. 150, 71 N.E. 478, 66 L.R.A. 82.

¹² *Yazoo R. R. Co. v Thomas*, 132 U.S. 174; *Kent v Somervell (Md.)* 7 Gill & J. 265; *County of York v Crafton*, 100 Pa. St. 619. Also see *infra*, § 205.

or, as has been said, it is a key to the construction of a statute and should be resorted to to unlock the minds of its makers.¹³

§ 89. **The Enacting Clause. (Style of Act.)** — The enacting clause, sometimes referred to as the commencement or style of the act, is used to indicate the authority from which the statute emanates.¹⁴ Indeed, it is a custom of long standing to cause legislative enactments to express on their face the authority by which they were enacted or promulgated. And while most state constitutions prescribe the form of the style of legislative enactments, declarations may be found, even in the absence of such provisions, that the enacting clause is essential to a valid law.¹⁵ While this is true under constitutional provisions,¹⁶ the weight of authority is opposed to the view announced by such statements in the absence of constitutional provisions.¹⁷

An enacting clause need not, however, be incorporated in each separate section in the absence of a constitutional requirement to that effect,¹⁸ nor need an entire enacting clause precede every law contained in a code, as it is sufficient if the bill enacting the code contains the required words of enactment.¹⁹ The enabling clause of the code may be regarded as that of all the laws embraced in the code, largely as a matter of practicality.

¹³ Mayor, etc., v Moore & Johnson (Md.) 6 Har. & J. 375.

¹⁴ "The purpose of provisions of this character is that all statutes bear upon their face a declaration of the sovereign authority by which they are enacted and declared to be the law, and to promote and preserve uniformity in legislation. Such clauses also import a command of obedience and clothe the statute with a certain dignity, believed in all times to command respect and aid in the enforcement of laws. These are the sole purposes of enacting clauses". State v Burrow, 119 Tenn. 376, 104 S.W. 526. See also Ferrell v Keel, 105 Ark. 380, 151 S.W. 269; Com. v Ill. Cent. R. Co., 160 Ky. 745, 170 S.W. 171.

¹⁵ In re Government Seat, 1 Wash. T. 115. Also see note, 13 Va. L.Rev. 58 (1926) and note, L.R.A. 1915 B, 1060.

¹⁶ Swann v Buck, 40 Miss. 268; Colby v City of Medford, 85 Ore. 485, 167 Pac. 487. Apparently contra: Cape Girardeau v Riley, 52 Mo. 424; State v Burrow, 119 Tenn. 376, 104 S.W. 526 ("It is not of the essence of the law, adds nothing to its meaning, and furnishes no aid in its construction.") McPherson v Leonard, 29 Md. 377 (provision held directory).

¹⁷ State v Reilly, 88 N.J. L. 104, 95 Atl. 1005; Turner v McCain, 26 Okla. 132, 109 Pac. 821; Watson v Corey, 6 Utah 150, 21 Pac. 1089.

¹⁸ McKee v Am. Trust Co., 166 Ark. 480; Levin v Hewes, 118 Md. 624, 86 Atl. 233.

¹⁹ Dew v Cunningham, 28 Ala. 466.

The form of the enacting clause usually required by most state constitutions begins with the expression "Be it enacted" and is followed by the words "By the legislature" or "By the general assembly" of the particular state in question.²⁰

In some states it is held that the constitutional requirements pertaining to enacting clauses are simply directory so that a failure to comply with them does not make the enactment void,²¹ while others regard compliance as mandatory and hence necessary to the validity of an act.²² The former view rests largely upon the principle that the will of the legislature should not be defeated by technical requirements.²³ The other view emphasizes the dangers obvi-

²⁰ *McPherson v Leonard*, 29 Md. 377; *State v Burrow*, 119 Tenn. 376, 104 S.W. 526. Of course, there are variations in the form in the different states. Sometimes the clause may begin "The General Assembly may enact." *State v Patterson*, 98 N.C. 660, 4 S.E. 350. The Constitution of Oklahoma requires that the style of all bills shall begin with "Be it enacted by the people of the state of Oklahoma." But the constitutional provisions pertaining to the form of the enacting clause of initiated or referred laws, do not apply to other acts. *Adcock v Coker*, 105 Ark. 210, 151 S.W. 253, and *Ex parte Hudson*, 3 Okla. Cr. 393, 106 Pac. 540, 107 Pac. 738.

²¹ *Shreveport v Dale*, 149 La. 439, 89 So. 408; *State v Baltimore & O. R. Co.*, 113 Md. 179, 77 Atl. 433; *Swann v Buck*, 40 Miss. 269; *Cape Girardeau v Riley*, 52 Mo. 424; *Turner v McCain*, 26 Okla. 132, 109 Pac. 821.

²² *Peo. v Contract Commrs.*, 120 Ill. 322, 11 N.E. 180; *May v Rice*, 91 Ind. 546; *Comm. v Ill. Cent. R. Co.*, 160 Ky. 745, 170 S.W. 171; *Peo. v Dettenthaler*, 118 Mich. 595, 77 N.W. 450, 44 L.R.A. 164; *Sjoberg v Security Sav., Etc., Ass'n*, 73 Minn. 203, 75 N.W. 1116; *State v Rogers*, 10 Nev. 250; *State v Burrows*, 119 Tenn. 376, 104 S.W. 526.

²³ "The argument against requiring a literal compliance with any form of words in the enacting clause, as a condition of giving effect to a statute, would be very strong on the source of convenience; for the plainest expressions of the legislative will, and the most urgent in their character, would be constantly liable to be defeated by the slightest omission or departure from the established phraseology. No possible good could be achieved by such strictness, and the greatest evil might result from it. There are no exclusive words in the constitution negating the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only." *Swann v Buck*, 40 Miss. 268. "To hold that a law supported by these sanctions was not valid because certain formal and immaterial words were omitted, would be sacrificing substance to mere form, which I think the court is not justified in doing." *Cape Girardeau v Riley*, 52 Mo. 424. See also *Hardesty v Taft*, 23 Md. 512; *McPherson v Leonard*, 29 Md. 377.

ously attached to departures from constitutional requirements.²⁴ There is considerable merit in the arguments in support of each view.

In accord with the holding that the requirements are mandatory, equivalent words will not suffice,²⁵ but if such requirements are considered directory, substantial compliance is sufficient.²⁶ Yet, regardless of whether the provisions of the constitution are considered mandatory or directory, it would seem a commendable legislative policy to word the enacting clause in the precise language of the constitution. If the constitutional requirements are directory, no injury is caused since an enactment will not ordinarily be void if superfluous words are added.²⁷ It should be remembered, however, that, if the enacting clause is mandatory, it must be found in the enrolled act in order for the act to be valid.²⁸ Such a clause should also be affixed to the act when it is introduced and enacted by the legislature and not at a later date.²⁹ Joint resolutions, on the other hand, are not subject to constitutional provisions regarding enacting clauses,³⁰ particularly where the constitution makes a distinction between a bill and a resolution, even if merely by inference.³¹

²⁴ "If a positive requirement of this character—can be disregarded, so may others of a different character; and where will the limit be affixed or practical discrimination made as to what parts of the organic law of the state are to be held advisory, directory or mandatory? Disregard of the requirements of the constitution, although, perchance, in matters of mere form and style, in any part, in a law, may establish dangerous examples and should in all proper ways be discountenanced." *State v Rogers*, 10 Nev. 250.

²⁵ See Note, L.R.A. 1915 B 1062.

²⁶ *Fowler v Stone*, 149 Ga. 125, 99 S.E. 291; *Louisville Trust Co. v Morgan*, 180 Ky. 609, 203 S.W. 555, 7 A.L.R. 396; *Shreveport v Dale*, 149 La. 439, 89 So. 408; *State v Baltimore, etc., R. Co.*, 113 Md. 179, 77 Atl. 433; *Swann v Buck*, 40 Miss. 268; *Smith v Jennings*, 67 S.C. 324, 45 S.E. 821, err. dis. 206 U.S. 276, 51 L.Ed. 1061, 27 S.Ct. 610; *State v Burrow*, 119 Tenn. 376, 104 S.W. 526.

²⁷ *Montgomery Amusement Co. v Montgomery Traction Co.*, 139 Fed. 353, aff. 140 Fed. 988, 72 C.C.A. 682.

²⁸ *State v Rogers*, 10 Nev. 250.

²⁹ *People v Dettenthaler*, 118 Mich. 595, 77 N.W. 450, 44 L.R.A. 164; *Kefauver v Spurling*, 154 Tenn. 613, 290 S.W. 14.

³⁰ *Hoyt v Sprague*, 103 U.S. 613, 26 L.Ed. 585. But see *Smith v Jennings*, 67 S.C. 324, 45 S.E. 821, err. dis. 206 U.S. 276, 27 S.Ct. 610, 51 L.Ed. 1061.

³¹ *May v Rice*, 91 Ind. 546.

§ 90. **The Purview, or Body of the Act.**³²—While the major discussion of this part of a statute will be found elsewhere, there are several matters particularly pertinent at this point. As will also appear hereafter,³³ the content or subject matter of a statute depends to a large extent upon its title. But aside from this, certain requirements of form may be prescribed by the constitution. Among such requirements, will be found one prescribing that all bills shall be divided into articles and sections.³⁴ This requirement, however, is prescribed for the sake of convenience rather than for any operative effect, so that the failure to comply with the constitutional provision, will not render the enactment invalid.³⁵

§ 91. **Exceptions and Provisos.**—While there is considerable similarity between an exception and a proviso—each restrains the enacting clause and operates to except something which would otherwise fall within the general terms of the statute,³⁶—there is a technical distinction between them, although even that is frequently ignored and the two terms used synonymously.³⁷ The exception, however, operates to affirm the operation of the statute to all cases not excepted and excludes all other exceptions;³⁸ that is, it exempts something which would otherwise fall within the general words

³² See *infra*, Chapt. X, Title and Subject Matter.

³³ *Ibid.*

³⁴ *State v Pitts*, 160 Ala. 133, 49 So. 441 (provision held not violated by striking out one section and the substitution of another during passage of the bill); *Hardesty v Taft*, 23 Md. 512 (compliance held sufficient where statute provided that the subject matter shall be added to the code under a new article and divided into titles and sections).

³⁵ *Hardesty v Taft*, 23 Md. 512; *Dorchester County v Meekins*, 50 Md. 28. See also *Leven v Hewes*, 118 Md. 624, 86 Atl. 233 (section numbers are no vital part of the act). Also see § 207, *infra*.

³⁶ *Wayman v Southard (U.S.)* 10 Wheat. 1, 6 L.Ed. 253; *Vorhees v Bank of U.S. (U.S.)* 10 Pet. 449; *Pearce v Bank of Mobile*, 33 Ala. 693; *McRae v Holcomb*, 46 Ark. 306.

³⁷ See *U.S. v Cook (U.S.)* 17 Wall. 168, 21 L.Ed. 538; *Dollar Savings Bank v U.S. (U.S.)* 19 Wall. 227, 22 L.Ed. 80; *Schlemmer v Buffalo R. Co.*, 205 U.S. 1, 51 L.Ed. 681, 27 S.Ct. 407; *In re Johnson (Calif.)* 273 Pac. 1091, *affd.* 208 Cal. 232, 281 Pac. 57; *Terrell v Paducah*, 122 Ky. 331, 92 S.W. 310; *Com. v Fusarina*, 26 Pa. Dist. 548, 44 Pa. Co. 501.

³⁸ *Bend v Hoyt (U.S.)* 13 Pet. 261, 10 L.Ed. 154; *Equit. Life Assur. Soc. v Clements*, 140 U.S. 226, 11 S.Ct. 822, 35 L.Ed. 497.

of the statute.³⁹ A proviso, on the other hand, is a clause added to an enactment for the purpose of acting as a restraint upon, or as a qualification of the generality of the language which it follows.⁴⁰ Sometimes, however, as a precautionary measure, it is used to explain the general words of the act and to exclude some ground of misinterpretation which would extend it to cases not intended to be brought within its operation or purview.⁴¹ Some cases apparently ascribe three functions to the proviso: (1) To exempt something from the enacting clause; (2) To qualify or restrain its generality; (3) And to exclude some possible misinterpretation of it as extending to cases not intended by the legislature.⁴² But the first function would seem to be that of the exception.⁴³ And technically, the proviso should not be used to enlarge the operation of

³⁹ *Brown v Maryland (U.S.)* 12 Wheat. 419, 6 L.Ed. 678; *Washington v Atlantic Coast Line R. Co.*, 136 Ga. 638, 71 S.E. 1066; *Campbell v Jackman*, 140 Iowa 475, 118 N.W. 755; *People v Bailey*, 171 N.Y.S. 394, 103 Misc. 366; *Johnson's Case*, 34 Pa. Co. 631; *Pabst Brewing Co. v City of Milwaukee*, 148 Wis. 582, 133 N.W. 1112.

⁴⁰ *Wayman v Southard (U.S.)* 10 Wheat. 1, 6 L.Ed. 253; *U.S. v Morrow*, 266 U.S. 531, 69 L.Ed. 425, 45 S.Ct. 173, reversing 58 Ct. Cl. 20; *Cox v Hart*, 260 U.S. 427, 67 L.Ed. 332, 43 S.Ct. 154; *In re Johnson (Cal.)* 273 Pac. 1091, *affd.* 208 Cal. 282, 281 Pac. 57; *Chicago, etc., R. Co. v. Doyle*, 258 Ill. 624, 102 N.E. 260; *Peo. v Andrus*, 299 Ill. 50, 132 N.E. 225, reversing 219 Ill. Ap. 205; *McDougal v State*, 183 Ind. 168, 108 N.E. 524; *Wolf v Bauereis*, 72 Md. 481, 19 Atl. 1045; *Castilo v State Highway Dept.*, 312 Mo. 244, 279 S.W. 673; *State v Summers*, 118 Neb. 189, 223 N.W. 957; *Peo. v Kelly*, 76 N.Y. 475; *Juniper v Lyles*, 77 Okla. 57, 185 Pac. 1084; *Meyers v Pac. States Lumber Co.*, 122 Ore. 315, 259 Pac. 203; *State v Harden*, 62 W.Va. 313, 58 S.E. 715; *State v Superior Court*, 119 Wash. 73, 204 Pac. 1053.

⁴¹ *Detroit Citizens St. R. Co. v Detroit*, 64 Fed. 628, 22 U.S. Ap. 570, 12 C.C.A. 365, 26 L.R.A. 667; *Terrell v Paducah*, 122 Ky. 331, 92 S.W. 310; *DeGraft v Went*, 164 Ill. 485, 45 N.E. 1075; *Castilo v State Highway Comm.*, 312 Mo. 244, 279 S.W. 673; *Saling v McKinney*, 1 Leigh (Va.) 42.

⁴² *U.S. v Cook (U.S.)* 17 Wall. 168, 21 L.Ed. 538; *Chesapeake, etc., Tel. Co. v Manning*, 186 U.S. 232, 46 L.Ed. 1144, 22 S.Ct. 881; *U.S. v Morrow*, 266 U.S. 531, 69 L.Ed. 425, 45 S.Ct. 173; *McDonald v U.S.*, 279 U.S. 12, 73 L.Ed. 582, 49 S.Ct. 218; *State v Styles*, 212 Ala. 468, 102 So. 901.

⁴³ See note 39, *supra*.

a statute,⁴⁴ although it appears to be used for this purpose occasionally.⁴⁵ Moreover, in actual practice, and as a general rule, the proviso is introduced by the word "provided", although the use of this word is not mandatory.⁴⁶ In fact, amendments are often added to statutes by use of this same word.⁴⁷ Nor is it necessary that the exception be placed in any particular position in a bill. It has been placed in a separate section of the statute,⁴⁸ and even in a separate statute.⁴⁹ But caution should be exercised to make sure that it operates as an exception, not only because of the language used,⁵⁰ but also because of the position in which the proviso is placed. Its operation seems generally confined to the clause or distinct portion of the statute which immediately precedes it, in the absence of a contrary legislative intent.⁵¹ And, if the exception is placed in the enacting clause of a statute, it must be negatived in pleading but a separate proviso need not.⁵²

§ 92. Interpretation Clauses.—The legislature can define its own language and prescribe rules for its construction which will

⁴⁴ *Patterson v Winn* (U.S.) 11 Wheat. 380, 6 L.Ed. 500; *People v Continental Beneficial Assoc.*, 289 Ill. 40, 124 N.E. 352, affirming 212 Ill. Ap. 422; *Murphy v Gault*, 179 Ind. 658, 101 N.E. 632, reversing 98 N.E. 878; *Wolf v Bauereis*, 72 Md. 481, 19 Atl. 1045; *Luce v Rogers*, 181 Mich. 599, 148 N.W. 381; *State v Brown*, 56 Minn. 269, 57 N.W. 659; *Castilo v State Highway Comm.*, 312 Mo. 244, 279 S.W. 673; *Van Reipen v Jersey City*, 58 N.J. L. 262, 33 Atl. 740; *People v Kelly*, 76 N.Y. 475; *State v Young*, 74 Ore. 399, 145 Pac. 647; *Com. v Charity Hospital*, 199 Pa. 119, 48 Atl. 906; *Jordan v So. Boston*, 138 Va. 338, 122 S.E. 265; *Salling v McKinney*, 1 Leigh (Va.) 42; *State v Ripley*, 104 Wash. 299, 176 Pac. 343.

⁴⁵ *U.S. v Dickson* (U.S.) 15 Pet. 141, 10 L.Ed. 689; *Am. Express Co. v U.S.*, 212 U.S. 522, 53 L.Ed. 635, 29 S.Ct. 315; *U.S. v Morrow*, 266 U.S. 531, 69 L.Ed. 425, 45 S.Ct. 173.

⁴⁶ See *McDonald v U.S.*, 279 U.S. 12, 73 L.Ed. 582, 49 S.Ct. 218; *Rowell v Janvrin*, 151 N.Y. 60, 45 N.E. 398; *Mackenzie v Douglas County*, 81 Ore. 442, 159 Pac. 625.

⁴⁷ *Georgia R., etc., Co. v Smith*, 128 U.S. 174, 32 L.Ed. 377, 9 S.Ct. 47.

⁴⁸ *State v Schlitz Brewing Co.*, 104 Tenn. 715, 59 S.W. 1033, *U.S. v Toco*, 12 Philippine 262.

⁴⁹ *U.S. v Toco*, 12 Philippine 262.

⁵⁰ *Meyer v State*, 134 Wis. 156, 114 N.W. 501.

⁵¹ *U.S. v Bernoys*, 158 Fed. 792, 86 C.C.A. 52; *Boynton v People*, 166 N.Y. 64, 46 N.E. 791; *Sullivan v Bailey*, 125 Mich. 104, 83 N.W. 996.

⁵² See *People v Berberich & Taynbee* (N.Y.) 11 How. Pr. R. 333.

generally be binding on the courts.⁵³ Such legislative definitions need not be strictly in accord with the ordinary meaning of the language defined.⁵⁴ Yet interpretation clauses should not be used to give new meaning to plain words; rather, if they are to be used, they should be employed to fix the meaning of words which are ambiguous or equivocal,⁵⁵ although even this use has been looked upon with disfavor,⁵⁶ particularly since the words used in declaring the meaning of other words, may also need interpretation.⁵⁷ And there is this additional danger; the legislature may use the same word in the same statute in several different senses. Consequently, although the definition of the legislature should not apply to the word in one or more places, there may be nothing in the statute to indicate differently.⁵⁸

The true province of the legislature, however, is not to construe but to enact legislation.⁵⁹ As a result, the question naturally arises whether prospective legislation as to how to construe a statute is an exercise of the judicial function.⁶⁰ Apparently, this question must be answered in the affirmative. Since the legislature cannot set aside the construction of a law already applied by the courts to actual cases, neither can it compel courts for the future to adopt

⁵³ *Collins v Texas*, 223 U.S. 288, 56 L.Ed. 439, 32 S.Ct. 286; *State v Schlenker*, 112 Iowa 642, 84 N.W. 698, 51 L.R.A. 347; *St. Louis v Nash*, 266 Mo. 523, 181 S.W. 1145; *State v American Surety Co.*, 90 Neb. 154, 91 Neb. 22, 133 N.W. 235, 135 N.W. 365; *Rossmiller v State*, 114 Wis. 169, 89 N.W. 839, 58 L.R.A. 93.

⁵⁴ *Smith v State*, 28 Ind. 321; *St. ex rel Exchange Bank v Allison*, 155 Mo. 325, 56 S.W. 467; *State v American Surety Co.*, 90 Neb. 154, 91 Neb. 22, 133 N.W. 235, 135 N.W. 365; *Jones v Surprise*, 64 N.H. 243, 9 Atl. 384; *Farmers Bank v Hale*, 59 N.Y. 53.

⁵⁵ *Haley v Philadelphia*, 68 Pa. 45; *Common. v Warwick*, 172 Pa. 140, 33 Atl. 373.

⁵⁶ *State v Standard Oil Co.*, 61 Ore. 438, 123 Pac. 40.

⁵⁷ "We cannot refrain from expressing a serious doubt whether interpretation clauses will not rather embarrass the courts in their decisions than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy; and the application of them to particular cases may give rise to endless doubt." *Regina v Justices*, 7 Ad. & E. 480.

⁵⁸ *Lindsay v Cundy*, L.R. 1 Q.B. Civ. 358.

⁵⁹ *Ogden v Blackledge (U.S.)* 2 Cranch 272, 2 L.Ed. 276.

⁶⁰ For a general discussion, see Freund, *Interpretation of Statutes*, 65 Pa. L. Rev. 207-11 (1917).

a particular construction of a law which the legislature permits to remain in force.⁶¹

§ 93. **Repealing and Saving Clauses.**—As is apparent, repealing clauses are used to terminate a statute in whole or in part. On the other hand, a saving clause is used to establish an exemption from the general language of a statute; that is, to restrict a repealing act. It is usually inserted in a repealing act,⁶² and follows the repealing clause. Since an absolute repeal of a statute terminates the statute in its entirety and puts an end to existing powers, inchoate rights, penalties incurred, and pending proceedings dependent upon the repealed act, a saving clause, or some special provision in the repealing act, is required to preserve these. This is the chief purpose of the saving clause,⁶³ although it also performs another function. It is declaratory of a rule of construction.⁶⁴ Moreover, from the standpoint of effect, an amendment may be regarded as a repealing act, for an amendment may abrogate a law either wholly or partially.

§ 94. **Miscellaneous Matters.**—The number of a bill,⁶⁵ section numbers,⁶⁶ and possibly even sections and articles as divisions,⁶⁷ the index,⁶⁸ and marginal notes,⁶⁹ are not essential or material parts of a statute, or for that matter, some⁷⁰ may not even be regarded as any part of the statute whatsoever. And from a practical standpoint, the punctuation of a statute is not an essential part of a stat-

⁶¹ *Common. v Warwick*, 172 Pa. 140, 33 Atl. 373. But see *City of Cambridge v City of Boston*, 130 Mass. 357; *People v Board of Supervisors*, 16 N.Y. 424. And see *State ex rel Campbell v Superior Court*, 25 Wash. 271, 65 Pac. 183, that a law not yet effective cannot be interpreted by the courts.

⁶² See *Jennings v Hammond*, 9 Miss. 174; *Beilin v Wein*, 101 N.Y. S. 38, 51 Misc. 595.

⁶³ *Rosenberg v Bump*, 43 Cal. Ap. 376, 185 Pac. 218.

⁶⁴ *Louisville & N. R. Co. v Western Union Telegraph Co.*, 268 Fed. 4, cert. den. 254 U.S. 650, 65 L.Ed. 457, 41 S.Ct. 147; *Files v Fuller*, 44 Ark. 273; *Neilson v Perkins*, 86 Conn. 425, 85 Atl. 686; *State v McCafferty*, 25 Okla. 2, 105 Pac. 992.

⁶⁵ *Valusia County v State*, 98 Fla. 1166, 125 So. 376.

⁶⁶ *State v Pitts*, 160 Ala. 133, 49 So. 441; *Levin v Hewes*, 118 Md. 624, 86 Atl. 233.

⁶⁷ See *supra*, § 90, notes 34 and 35.

⁶⁸ *State v Hill*, 177 Iowa 270, 158 N.W. 518.

⁶⁹ *Sutton v Sutton (Eng.)* L.R. 22 Ch. Div. 511.

⁷⁰ *State v Hill*, 177 Iowa 270, 158 N.W. 518 (index).

ute, since, as we shall hereinafter see,⁷¹ it may either be disregarded, or supplied.⁷²

⁷¹ *Infra.* § 199.

⁷² *Albright v Payne*, 43 Ohio St. 8; *Allen v Russell*, 39 Wis. 336; *Hammock v Loan & Trust Co.*, 105 U.S. 77.

CHAPTER X

TITLE AND SUBJECT MATTER

- § 95. Constitutional Provisions, Generally.
- § 96. Effect of Non-Compliance.
- § 97. Legislation to Which Applicable.
- § 98. Singleness of Subject or Object.
- § 99. Sufficiency of the Title.
- § 100. Construction of the Title.
- § 101. Variance Between Title and Subject.
- § 102. Plurality of Subjects Expressed in the Title.
- § 103. Title and Subject of Amendatory Acts.
- § 104. Title and Subject of Repealing Acts.

§ 95. **Constitutional Provisions, Generally.**—In many instances, in state constitutions, provisions will be found to the effect that no act shall contain more than one subject,¹ which shall be expressed in the title. Several use the word “object” instead of the word “subject”. The two terms, however, while not synonymous, are generally considered as equivalent.² Some annex to “one subject”, the phrase “and matters properly connected therewith”; and, where this is the case, the term “subject” is held to mean the thing about which the legislation is had, and “matters” refers to the incidental or secondary things.³ And in many instances, the subject or object is required to be clearly or briefly expressed in the title.

These various requirements have been prescribed in an effort to prevent a number of abuses which had developed in legislative bodies. Summarized, they have been intended: “(1) to prevent ‘log rolling’ legislation; (2) to prevent surprise, or fraud, in the

¹ For states having no provision of this type, see Chapt. IX, § 87, *supra*.

² *State v County Judge*, 2 Iowa 280; *New Orleans Basin Canal v Carre Co.*, 7 La. A. 396; *Board of Education v Straub* (Mich.) 148 N.W. 716; *State v Collier*, 160 Tenn. 403, 23 S.W. (2) 897, and see Note 61, Am. Dec. 344. But note, *State v Mirabel*, 33 N.M. 553, 273 Pac. 928. *Spencer v Hunt* (Fla.) 147 So. 282; *State v Steinwedel* (Ind.) 180 N.E. 865; *Louisiana v Ferguson* (La.) 28 So. 917. The constitutions of Louisiana, Michigan, New Jersey, Virginia and West Virginia use the word “object”; thirty-four states use “subject”, and Georgia and Mississippi use a combination of “subject-matter” and “subject”.

³ *Board of Commissioners v Scanlan* (Ind.) 98 N.E. 801. Also see *Wayne Township v Brown* (Ind.) 186 N.E. 841, and § 98, *infra*.

legislature by means of provisions in bills of which the titles give no intimation; and (3) to apprise the people of the subject of legislation under consideration".⁴

Consequently, and according to the weight of authority, these constitutional provisions are mandatory,⁵ yet, they should receive a reasonable and a liberal construction,⁶ in favor of their

⁴ Statutes, 25 R.C.L. 836, § 83. See also *Utah Power & Light Co. v Phost*, 286 U.S. 165, 76 L.Ed. 1038, 52 S.Ct. 548; *Heron v Riley (Calif.)* 28 Pac. 160; *Grodin v Barns*, 119 Fla. 405, 161 So. 568; *Cloyd v Vermillion County*, 360 Ill. 610, 196 N.E. 820 (not intended to impede legislation); *Albert v Milk Control Board (Ind.)* 200 N.E. 688; *Frost v Johnson*, 262 Ky. 592, 90 S.W. (2) 1045; *Jackson v State*, 102 Miss. 663, 59 So. 873; *Spier v Thomas (Neb.)* 269 N.W. 61 (to prevent surreptitious legislation); *State v Armstrong*, 31 N.M. 220, 243 Pac. 333; *Daly v Berry*, 45 N.D. 287, 178 N.W. 104; *Arthur v Johnston (S.C.)* 194 S.E. 151. And note *Manson, C. H., The Drafting of Statute Titles (1934)* Ind. L.J. 155, 156. Also note the reason set forth in *Shrout v Rinker*, 148 Kan. 820, 84 Pac. (2) 974, to the effect that the constitutional requirement is intended to remove any feeling upon the part of the members of the legislature that they should vote for a bill which contains a provision to which they are opposed, in order to secure the passage of the bill because it contains some provisions which they favor.

⁵ *Mobile Dry Docks Co. v Mobile*, 146 Ala. 198, 40 So. 205; *Wallace v Zinman*, 200 Calif. 585, 254 Pac. 946, 62 A.L.R. 1341; *In re Cypress Farms Ditch (Del.)* 180 Atl. 536; *State ex rel Meerdink v Poston (Fla.)* 160 So. 875; *Galpin v Chicago*, 269 Ill. 27, 109 N.E. 713; *Jackson v State*, 194 Ind. 248, 142 N.E. 423; *State v Haun*, 61 Kan. 146, 59 Pac. 340, 47 L.R.A. 369; *State v Burgdoerfer*, 107 Mo. 1, 17 S.W. 646, 14 L.R.A. 846; *Worthington v Dist. Ct.*, 37 Nev. 212, 142 Pac. 230; *Daly v Beery*, 45 N.D. 287, 178 N.W. 104; *State v Johnson*, 90 Okla. 21, 215 Pac. 945; *Cooper v King (Okla.)* 42 Pac. (2) 249; *Rowe v Richards*, 32 S.D. 66, 142 N.W. 664; *Acklen v Thompson*, 122 Tenn. 43, 126 S.W. 730; *Giddings v San Antonio*, 47 Tex. 548; *Baker v Department of Reg. (Utah)* 3 Pac. (2) 1082; *Lacey v Palmer*, 93 Va. 159, 24 S.E. 930; *State v Superior Court*, 28 Wash. 317, 68 Pac. 957. But there is authority to the contra. See *Jackson v State*, 102 Miss. 663, 59 So. 873; *Weil v State*, 46 Ohio St. 450, 21 N.E. 643; and see *Gully v Jackson International Co. (Miss.)* 145 So. 905.

⁶ *In re Miller*, 29 Ariz. 582, 244 Pac. 376; *In re Bear*, 216 Calif. 536, 15 Pac. (2) 489, 83 A.L.R. 1402; *Plumb v Christie*, 103 Ga. 686, 30 S.E. 759, 42 L.R.A. 181; *Pioneer Irri. Dist. v Bradley*, 8 Idaho 310, 68 Pac. 295; *People v Price*, 257 Ill. 587, 101 N.E. 196; *Bolivar Twp. Bd. v Hawkins*, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271; *State v Topeka Club*, 82 Kan. 756, 109 Pac. 183; *Campbell v Commonwealth*, 229 Ky. 264, 17 S.W. (2) 227, 63 A.L.R. 932; *Commerce-Guardian Trust v State*, 228 Mich. 316, 200 N.W. 267; *State v Pioneer Press Co.*, 100 Minn. 173, 110 N.W. 867; *State v Burgdoerfer*, 107 Mo. 1, 17 S.W. 646; *Freeman v Halliday, (S.C.)* 164 S.E. 20; *Board of Insurance Comrs. v Sproles Motor Freight Lines (Tex. Civ. Ap.)* 94 S.W. (2) 769; *Shea v Olson (Wash.)* 53 Pac. (2) 615.

legality, with due regard being given to their purpose,⁷ and especially so as not to unreasonably cripple or needlessly hamper the legislative process and place it into a straight-jacket.⁸ After all such provisions are not intended to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiply their numbers.⁹

Some states, however, prescribe certain exceptions to the operation of the title-body clause; general appropriation bills and bills for the codification and general revision of the law being among those falling within these exceptions generally.¹⁰

§ 96. Effect of Non-Compliance.—Inasmuch as the constitutional provisions with reference to the title and subject matter of an act, are mandatory,¹¹ a failure to meet the constitutional requirement will invalidate the enactment in whole or in part.¹² The precise extent of the illegality will depend upon the degree of the departure from the constitutional requirement that an act shall contain but “one subject which shall be expressed in the title”.¹³ However, if two or more distinct subjects are expressed in the title, the whole act will be invalid.¹⁴ Similarly, if the statute is broader

⁷ *Commerce-Guardian Trust v State*, 228 Mich. 316, 200 N.W. 267; *O’Conner v St. Louis Transit Co.*, 198 Mo. 622, 97 S.W. 150; *Nalley v Home Ins. Co.*, 250 Mo. 452, 157 S.W. 769; *Wheelon v S. D. Land Bd.*, 43 S.D. 551, 181 N.W. 359.

⁸ *Judson v Bessemer*, 87 Ala. 240, 6 So. 267, 4 L.R.A. 742; *Harris v State ex rel Williams (Ala.)* 151 So. 858; *Clendaniel v Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036; *People v McBride*, 234 Ill. 146, 84 N.E. 865; *Moore-Mansfield Construction Co. v Indianapolis R. Co.*, 179 Ind. 356, 101 N.E. 296; *Parkinson v State*, 14 Md. 184; *State v McKinney*, 29 Mont. 375, 74 Pac. 1095; *State v Tibbetts*, 52 Neb. 228, 71 N.W. 990; *State v Nomland*, 3 N.D. 427, 52 N.W. 85; *Chicago R. I. & P. Ry. Co. v Excise Board*, 168 Okla. 519, 34 Pac. (2) 274; *Ryan v Louisville Terminal Co.*, 102 Tenn. 111, 50 S.W. 744, 45 L.R.A. 303.

⁹ See *People v Mahaney*, 13 Mich. 481; *Chumbley v People’s Bank (Tenn.)* 60 S.W. (2) 164.

¹⁰ Alabama, Colorado, Delaware, Missouri, Montana, New Mexico, Oklahoma, Pennsylvania, Texas, Utah and Wyoming, apparently constitute these states.

¹¹ See § 95, note 5, *supra*.

¹² *State v Schlitz Brewing Co.*, 104 Tenn. 715, 59 S.W. 1033.

¹³ See *infra*, Chapt. XVI, § 144 et seq., *Partial Invalidity*.

¹⁴ *Judson v Bessemer*, 87 Ala. 240, 6 So. 267, 4 L.R.A. 742; *Pioneer Irr. Dist. v Bradley*, 8 Idaho 310, 68 Pac. 295; *Ritchie v People*, 155 Ill. 98, 40 N.E. 454; *State v Ferguson*, 104 La. 249, 28 So. 917; *Davis v State*, 7 Md. 151.

than its title, the part without the scope of the title will be invalid;¹⁵ or if the part without the scope of the title is so intimately connected with the part expressed in the title that the former without the latter does not leave a statute complete in itself and capable of execution, the entire act will be invalid.¹⁶ It may, therefore, be stated, as a general rule, since the title defines the scope of the law,¹⁷ that an act can be valid only as to the part expressed in its title.¹⁸

§ 97. Legislation to Which Applicable.—Usually the provisions with reference to the title and subject matter will not only apply to legislation enacted by the legislature,¹⁹ but also to that passed by the people through the initiative process.²⁰ But such provisions are not, at least, in some jurisdictions, applicable to legis-

¹⁵ *Lacey v Palmer*, 93 Va. 159, 24 S.E. 930. See also *Ex parte Knight*, 52 Fla. 144, 41 So. 786; *Fleming v Greener*, 173 Ind. 260, 90 N.E. 72; *Bosworth v State University*, 166 Ky. 436, 179 S.W. 403; *Hamilton v Minneapolis Desk Mfg. Co.*, 78 Minn. 3, 80 N.W. 693; *Simon v Northup*, 27 Ore. 487, 40 Pac. 560; *Rowe v Richards*, 32 S.D. 66, 142 N.W. 664; *Giddings v San Antonio*, 47 Tex. 548.

¹⁶ *Vernor v Martindale*, 179 Mich. 157, 146 N.W. 338. See also *State v Davis*, 130 Ala. 148, 28 So. 917; *Bosworth v State University*, 166 Ky. 436, 179 S.W. 403; *Somerset County v Pocomoke Bridge Co.*, 109 Md. 1, 71 Atl. 462; *State v Justus*, 85 Minn. 279, 88 N.W. 759; *Wenham v State*, 65 Neb. 394, 91 N.W. 421; *Common. v Moir*, 199 Pa. St. 534, 49 Atl. 351, 53 L.R.A. 837.

¹⁷ See § 101, *infra*.

¹⁸ *State v Ferguson*, 104 La. 249, 28 So. 917.

¹⁹ *Tarkio v Cook*, 120 Mo. 1, 25 S.W. 202. But the title of a joint resolution proposing an amendment to the state constitution is not subject to this sort of constitutional requirement. *Gray v Winthrop*, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804. Also see note 21, *infra*.

²⁰ *Wallace v Zinman*, 200 Calif. 585, 254 Pac. 946, 62 A.L.R. 1341; *Armstrong v Mitten (Colo.)* 37 Pac. (2) 757; *Bartling v Wait*, 96 Neb. 532, 148 N.W. 507; *Daly v Berry*, 45 N.D. 287. But see *State v Langworthy*, 55 Ore. 303, 104 Pac. 424. And like the titles to statutes generally, the title of an initiated law should not be misleading. In *re Opinion of Justices*, 271 Mass. 582, 171 N.E. 294, 69 A.L.R. 388, or contain more than one subject. *State v Erickson*, 75 Mont. 429, 244 Pac. 287. Sometimes the number of words which may be used in the titles of initiated laws is specified. *State v Dixon*, 59 Mont. 58, 195 Pac. 841.

lation proposing amendments to the constitution,²¹ nor to codifications or general revisions of statutes,²² nor to appropriation bills.²³ Moreover, by virtue of constitutional provisions, they may be made applicable only to local and private acts.²⁴

§ 98. **Singleness of Subject or Object.**—Sometimes it is quite difficult to determine whether a particular statute deals with only one subject or object. However, the courts show considerable liberality in defining the scope of the term "subject".²⁵ The word is used in its ordinary sense and implies that there are numerous subjects of legislation and that only one of those subjects shall be embraced in any one act; so that, while the subject of an act must be single, the provisions involved may be multifarious.^{25a}

²¹ *People v Sours*, 31 Colo. 369, 74 Pac. 167; *People v Perkins*, 56 Colo. 17, 137 Pac. 55; *Gray v Winthrop*, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804; *Cooney v Foote*, 142 Ga. 647, 83 S.E. 537; *Campbell v Eugene*, 116 Ore. 264, 240 Pac. 418. This is true because in proposing a constitutional amendment, the legislature is said not to exercise legislative power.

²² *State v Freeland*, 106 S.C. 220, 91 S.E. 3, and note especially *Central of Georgia R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518: "An act . . . adopting a code or system of laws, obviously does not fall within any of the classes of mischiefs which this restriction in the constitution was intended to remedy." A general title will be sufficient. *Central of Georgia R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *State v Applegarth*, 81 Md. 293, 31 Atl. 961, 38 L.R.A. 812. All that is necessary is that matter should not be included in the body of the act which is so incongruous that it could not by fair intendment be considered germane to one general subject. *Pioneer Irr. Dist.*, 8 Idaho 310, 68 Pac. 295; *Cook v Marshall County*, 119 Iowa 384, 93 N.W. 372; *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923; *State v Treman*, 32 Wash. 294, 73 Pac. 375.

²³ See § 95, note 10, *supra*.

²⁴ *Belleville, etc., R. Co. v Gregory*, 15 Ill. 20; also see *Robia v Walker*, 230 Ap. Div. 666, 246 N.Y. S. 210; *In re Bulewicz*, 212 Wis. 249 N.W. 534.

²⁵ *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923; *Griffin v Thomas*, 86 Okla. 70, 206 Pac. 604. And see *Moats v Cook (W.Va.)* 167 S.E. 137, and *Allen v State (Neb.)* 262 N.W. 675, that the "subject" of an act is the matter or thing which forms the groundwork thereof, and may include many parts or things, so long as they are all germane to it and are such that, if traced back, will lead the mind to the subject as the generic lead. Also note *Warren v Walker*, 167 Tenn. 505, 71 S.W. (2) 1057, that the term "subject" is synonymous with "purpose". In *Pinder v Board of Supervisors (La.)* 146 So. 715, the "object" of a law is the aim or purpose of its enactment.

^{25a} *Owensboro v Hazel*, 229 Ky. 752, 17 S.W. (2) 1031; *State v Allen (Ore.)* 53 Pac. (2) 1054. And see *Peet Stock Remedy Co. v McMullen*, 32 Fed. (2) 669.

As a general rule, all matters, however diverse they may be, which have a logical or natural connection with,²⁶ or are germane to the general subject or object of an act,²⁷ may properly be included in one statute. Mere comprehensiveness or generality is therefore no objection,²⁸ so long as the title is not a cover to legislation incongruous in itself and which can by no fair intendment be considered as having a necessary or proper connection thereto.²⁹ As a result, many provisions and minor subjects may be included in the same statute, provided no matter is embraced in the enactment which is not logically or naturally connected with the main

²⁶ *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923. See also *Carter County v Sinton*, 120 U.S. 517, 30 L.Ed. 701, 7 S.Ct. 650; *Clendaniel v Conrad*, 3 Boyce (Del.) 218, 59 Atl. 948; *Isenhour v State*, 157 Ind. 517, 62 N.E. 40; *Campbell v Common.*, 229 Ky. 264, 17 S.W. (2) 227, 63 A.L.R. 932; *Phillips v Daniel (Tex. Civ. Ap.)* 94 S.W. (2) 1193. Also see *Board of Regents v Sullivan (Ariz.)* 42 Pac. (2) 619, that the test of duplicity of subject matter is whether or not the provisions of a bill are designed to accomplish separate and disassociated objects of legislative effort.

²⁷ *Marting v Porto Rico*, 46 Fed. (2) 427; *In re Miller*, 29 Ariz. 582, 244 Pac. 376; *Galeppi v Swanson (Cal. Ap.)* 290 Pac. 116; *Public Utilities Comm. v Manley (Colo.)* 60 Pac. (2) 913; *Fouracre v White*, 30 Dela. 25, 102 Atl. 186; *McSween v State Live Stock Bd.*, 97 Fla. 750, 122 So. 239; *Smallwood v Jeter*, 42 Idaho 169, 244 Pac. 149; *Michaels v Hill*, 328 Ill. 11, 159 N.E. 278; *Johns School Dist. v McCracken (Iowa)* 233 N.W. 147; *State v Beggs*, 126 Kan. 811, 271 Pac. 400; *Owensboro v Hazel*, 229 Ky. 752, 17 S.W. (2) 1031; *State v Dowling*, 120 So. 593, 167 La. 907; *State v Brooks-Scanlon Lumber Co.*, 128 Minn. 300, 150 N.W. 912; *Brown v State*, 323 Mo. 138, 19 S.W. (2) 12; *State v Ross*, 38 Mont. 326, 99 Pac. 1058; *Worthington v Dist. Ct.*, 37 Nev. 212, 142 Pac. 230; *State v Bader*, 102 N.J. L. 227, 131 Atl. 902; *State v Miller*, 33 N.M. 200, 263 Pac. 510; *People v Hennessy*, 206 N.Y. 33, 99 N.E. 87; *Lovejoy v Portland*, 95 Ore. 459, 188 Pac. 207; *Booth v Miller*, 237 Pa. 297, 85 Atl. 457; *Liquor Transportation Cases*, 140 Tenn. 582, 205 S.W. 423; *M. K. & T. R. Co. v Rockwall County Levee Dist.*, 117 Tex. 34, 297 S.W. 206, rev. 266 S.W. 163; *Utah State Fair Assn. v Green*, 68 Utah 251, 249 Pac. 1016; *Bowman v Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141. "Germane", in this connection, means in close relationship, appropriate, relevant, or pertinent. *State v Driscoll (Mont.)* 54 Pac. (2) 571.

²⁸ *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923; *Arthur v Johnson (S.C.)* 194 S.E. 151. Social welfare act held not violative of the constitution's provision relative to one subject. *Hawkins v State*, 148 Kan. 760, 84 Pac. (2) 930.

²⁹ *Cooley, Const. Lim. (8th Ed.)* p. 297.

object of the statute³⁰ and provided together they form only one general subject.³¹ In other words, all matters reasonably connected with the subject of the act and named in the title and not incongruous with it, may be included in the act.³²

Nor will an amendment violate the constitutional requirement, even though it amends a prior statute and enacts a new law on the same subject,³³ if the new matter which is added is germane to the purview of the original enactment.³⁴ And, in determining whether

³⁰ *Peet Stock Remedy Co. v. McMullen*, 32 Fed. (2) 669; *Hubbard v. State*, 172 Ala. 374, 55 So. 614; *Cobb v. Parnell* (Ark.) 36 S.W. (2) 388; *Ex parte Schuler*, 167 Calif. 282, 139 Pac. 685; *Trozzo v. People*, 51 Colo. 323, 117 Pac. 150; *State v. Hand*, 96 Fla. 799, 119 So. 376; *Chambers v. McCollum*, 47 Idaho 74, 272 Pac. 707; *Campe v. Cermak*, 330 Ill. 463, 161 N.E. 761; *White v. State*, 195 Ind. 63, 144 N.E. 531; *Cook v. Marshall County*, 119 Iowa 384, 93 N.W. 372; *In re Division of Howard County*, 15 Kan. 194; *Stone v. Lexington*, 192 Ky. 60, 232 S.W. 50; *State v. Loden*, 117 Md. 373, 83 Atl. 564; *Jarnowski v. Dilworth*, 191 Mich. 287, 157 N.W. 891; *Lyman v. Chase*, 178 Minn. 244, 226 N.W. 633; *State v. Buckner*, 308 Mo. 390, 272 S.W. 940; *State v. Erickson*, 75 Mont. 429, 244 Pac. 287; *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365; *State v. Bader*, 101 N.J. L. 289, 128 Atl. 178; *State v. Mirabel*, 33 N.M. 553, 273 Pac. 928; *Vroman v. Fish*, 170 N.Y. S. 421, 181 Ap. Div. 502; *Leedy v. Brown*, 27 Okla. 489, 113 Pac. 177; *Common. v. Snyder*, 274 Pa. 234, 123 Atl. 792; *In re Sioux Falls Traction Co. (S.D.)* 228 N.W. 179; *Athens Hosiery Mills v. Thomason*, 114 Tenn. 159, 231 S.W. 904; *Bitter v. Bexar County (Tex.)* 11 S.W. (2) 163; *Utah State Fair Assn. v. Green*, 68 Utah 251, 249 Pac. 1016; *Richmond v. Pace (Va.)* 103 S.E. 647; *State v. Oakley*, 129 Wash. 553, 225 Pac. 425; *State v. Levitan*, 200 Wis. 271, 228 N.W. 140. Consequently, a statute which provides for the supervision and regulation of persons, firms, corporations, and associations, owning, controlling, operating or managing motor vehicles used in the business of transporting persons over public highways, is not invalid as containing several subjects. *State ex rel Fohl v. Karel (Fla.)* 180 So. 3.

³¹ *Johnson v. Harrison*, 47 Minn. 575, 50 N.W. 923.

³² *Iowa-Nebraska Light & Power Co. v. City of Villisca (Iowa)* 261 N.W. 423.

³³ *State v. People's Slaughter-house*, 177 La. Ann. 46, 15 So. 408. Also see *State v. Brown*, 41 La. Ann. 771, 6 So. 638; *Miller v. Hurford*, 13 Neb. 13, 12 N.W. 832; *Fleming v. Royall*, 145 S.C. 438, 143 S.E. 162.

³⁴ *Heller v. People*, 2 Colo. Ap. 459, 31 Pac. 773. Also see § 98, *infra*. And note 18 *Iowa Law Rev.* 101 (1932).

an act contains more than one subject, recourse must be had to the body of the enactment and not to its title.³⁵

§ 99. Sufficiency of the Title.—As has been previously indicated,³⁶ the subject or object of an act must be expressed in its title, and, by virtue of several constitutional provisions, it must be expressed clearly. Although the use of the term “clearly” has been considered as requiring a more precise statement,³⁷ considerable doubt justly arises whether any greater precision is required than would be without the incorporation of the term,³⁸ since in any instance the title must fairly set forth the subject of the enactment,³⁹ with such clarity⁴⁰ as will give reasonable notice of the contents of the law.⁴¹ After all, the title is in the nature of a label,⁴² or a mark of identification,⁴³ and is intended to give notice

³⁵ *Monaghan v Lewis*, 5 Penn (Del.) 218, 59 Atl. 948; *Campe v Cermak*, 330 Ill. 463, 161 N.E. 761; *Jackson v State*, 194 Ind. 248, 142 N.E. 423; *State v Morton*, 182 La. 887, 162 So. 718; *Kent County v Reed*, 243 Mich. 120, 219 N.W. 656; *State v Ross*, 38 Mont. 319, 99 Pac. 1056; *Ex parte Ambler*, 11 Okla. Cr. 449, 148 Pac. 1061.

³⁶ See *supra*, § 95.

³⁷ *State v Burgdoerfer*, 107 Mo. 1, 17 S.W. 646, 14 L.R.A. 846.

³⁸ Compare *Lamar Canal Co. v Amity Land Co.*, 26 Colo. 370, 58 Pac. 600, with cases cited in note 40, *infra*.

³⁹ *People v Friederich*, 67 Colo. 69, 185 Pac. 657; *Jerome H. Sheip Co. v Amos* (Fla.) 130 So. 699; *People v DeGeovanni*, 236 Ill. 230, 157 N.E. 195; *Clark v Wallace County*, 54 Kan. 634; *Owensboro v Hazel*, 229 Ky. 752, 17 S.W. (2) 1031; *Baltimore v Williams*, 124 Md. 502, 92 Atl. 1066; *Kuhn v Thompson*, 168 Mich. 511, 134 N.W. 722; *In re Cupples*, 272 Mo. 465, 199 S.W. 556; *State v Tibbetts*, 52 Neb. 228, 71 N.W. 990; *Jersey City v Speer*, 78 N.J. L. 34, 72 Atl. 448; *State v Slusher*, 119 Ore. 141, 248 Pac. 358; *Fedorowicz v Brobst*, 62 Pa. Super 458; *Robinson v Columbia*, 116 S.C. 193, 107 S.E. 476; *Harris v Rush*, 157 Tenn. 295, 8 S.W. (2) 366; *Narrows v Giles County*, 128 Va. 572, 105 S.E. 82.

⁴⁰ See *Smith v Chase*, 91 Fla. 1044, 109 So. 94; *Sullivan v Minden Lumber Co.*, 135 La. 331, 65 So. 479; *Vernor v Martindale*, 179 Mich. 157, 146 N.W. 338; *State v Evans*, 154 Minn. 95, 191 N.W. 425, 27 A.L.R. 1165; *Sawter v Shoenthan*, 83 N.J. L. 499, 83 Atl. 1004; *State v Ingalls*, 18 N.M. 211, 135 Pac. 1177; *Dean v Bell*, 230 N.Y. 1, 128 N.E. 897; *Common. v Thomas*, 248 Pa. 256, 93 Atl. 1019.

⁴¹ *People v Howe*, 177 N.Y. 499, 69 N.E. 1114, 66 L.R.A. 664; *Fidelity Ins. Trust Co. v Shenandoah Valley R. Co.*, 86 Va. 1, 9 S.E. 759. But the means provided in the body of the statute for accomplishing its purpose does not need to be disclosed. *Williams v Dormany*, 99 Fla. 496, 126 So. 117. The means are presumed to be intended as necessary incidents. *Litchfield v Thorworth*, 337 Ill. 469, 169 N.E. 265.

⁴² *State v Lahiff*, 144 La. 362, 80 So. 590; *Boniewsky v Lodi Polish*, 103 N.J.L. 323, 136 Atl. 741; *Massie v Court of Common Pleas* (N.J.) 156 Atl. 377.

⁴³ *Kiernan v City of Portland*, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402.

of the subject or object of the act.⁴⁴ Hence, an elaborate statement is not required,⁴⁵ or, in fact desirable. Indeed a few well chosen words suggestive of the general subject is always to be preferred.⁴⁶ It is not necessary that the title be a synopsis, abstract, catalogue, epitome of, or a complete index to the contents or provisions of the enactment,⁴⁷ or set out the details.⁴⁸ Nor need matters properly

⁴⁴ *People v Pearson*, 314 Ill. 392, 145 N.E. 644; *State v Drabelle*, 258 Mo. 563, 167 S.W. 1016; *State v Hoadley*, 20 Nev. 317, 22 Pac. 99; *In re Reber*, 235 Pa. 622, 84 Atl. 587.

⁴⁵ *In re Peterson's Estate* (Wash.) 45 Pac. (2) 45. The title needs only indicate the character of the subject without entering into minute details. *Shoe Co. v Shartel*, 279 U.S. 429, 73 L.Ed. 781, 49 S.Ct. 380.

⁴⁶ *Ibid.*

⁴⁷ *Montclair v Ramsdell*, 107 U.S. 147, 27 L.Ed. 431, 2 S.Ct. 391; *Deyfoe v Superior Ct.*, 140 Calif. 476, 74 Pac. 28; *People v Flores* (Calif.) 36 Pac. (2) 239; *Clendaniel v Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036; *Plumb v Christie*, 103 Ga. 686, 30 S.E. 759, 42 L.R.A. 181; *People v McBride*, 234 Ill. 146, 84 N.E. 865; *Moore-Mansfield Constr. Co. v Indianapolis R. Co.*, 179 Ind. 356, 101 N.E. 296; *Albert v Milk Control Board* (Ind.) 200 N.E. 688; *State v Topeka Club*, 82 Kan. 756, 109 Pac. 183; *State v Loden*, 117 Md. 373, 83 Atl. 564; *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923; *Krench v State*, 277 Mich. 168, 269 N.W. 131; *State v Hedrick*, 294 Mo. 21, 241 S.W. 402; *Singer Mfg. Co. v Fleming*, 39 Neb. 679, 58 N.W. 226, 23 L.R.A. 210; *Spier v Thomas* (Neb.) 269 N.W. 61; *Common. v Herr*, 229 Pa. St. 132, 78 Atl. 68; *Turco Paint & Varnish Co. v Kalodner*, 320 Pa. 421, 184 Atl. 37; *Common. v Brown*, 91 Va. 762, 21 S.E. 357, 28 L.R.A. 110; *State v Sharpless*, 31 Wash. 191, 71 Pac. 737; *McEldowney v Wyatt*, 44 W.Va. 711, 30 S.E. 239, 45 L.R.A. 609; *Mensi v Walker*, 160 Tenn. 468, 26 S.W. (2) 132. And see *People v Howe*, 177 N.Y. 499, 69 N.E. 1114, 66 L.R.A. 664.

⁴⁸ *Morre v Payne*, 35 Fed. (2) 232; *In re Miller*, 29 Ariz. 582, 244 Pac. 376; *Hecke v Riley* (Calif.) 290 Pac. 451; *In re Cypress Farms Ditch* (Del.) 180 Atl. 536; *State ex rel Cochran v Lewis*, 118 Fla. 536, 159 So. 792, 99 A.L.R. 123; *Wright v Fulton County*, 169 Ga. 354, 150 S.E. 262; *People v Swanson*, 340 Ill. 188, 172 N.E. 3; *Sarlls v State*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; *State v Hutchinson Ice Cream Co.*, 168 Iowa 1, 147 N.W. 195; *State v Topeka Club*, 82 Kan. 756, 109 Pac. 183; *Estes v State Highway Comm.*, 235 Ky. 86, 29 S.W. (2) 583; *State v Archinard*, 152 La. 786, 94 So. 395; *Ruehl v State*, 130 Md. 188; *Baltimore v Fuget*, 164 Md. 335, 165 Atl. 618, 88 A.L.R. 1058; *Kerst v Nelson*, 171 Minn. 191, 213 N.W. 904, 54 A.L.R. 495; *Yazoo County v Warren*, 158 Miss. 323, 130 So. 287; *State v Buckner*, 308 Mo. 390, 272 S.W. 940; *State v Silver Bow Ref. Co.*, 78 Mont. 1, 252 Pac. 301; *Westbrook v State*, 120 Neb. 625, 234 N.W. 579; *Ferneti v West Jersey R. Co.*, 87 N.J.L. 268, 93 Atl. 576; *Great Northern R. Co. v Duncan*, 42 N.D. 346; *State v Tazwell*, 125 Ore. 528, 266 Pac. 238, 59 A.L.R. 1436; *Bridgewater v Big Beaver Bridge Co.*, 210 Pa. 105, 59 Atl. 679; *Witt v People's State Bank*, 166 S.C. 1, 164 S.E. 306, 83 A.L.R. 1068; *Rowe v Stanley Co.*, 52 S.D. 516, 219 N.W. 122; *Bitter v Bexar County* (Tex.) 11 S.W. (2) 163; *Bent v Weaver*, 108 W.Va. 299, 150 S.E. 738.

connected with the subject of the act, be expressed in the title.⁴⁹ Nor does it need to state the reasons for, or the purpose of the act's passage.⁵⁰ If the title fairly indicates the general subject and reasonably covers all the provisions of the enactment, and is not intended to mislead,⁵¹ and expresses the subject of the act in such terms that the legislators and the people may not be left in doubt as to the matter treated,⁵² it will be deemed sufficient. It meets the constitutional requirement of singleness of subject, if its verbiage is sufficient to put one on notice and cause him to inquire into its contents.⁵³ It may, however, be couched in general terms, or it may summarize or embrace a table of contents, or be an index or abstract of the contents of the act,^{53a} although the generality of a title may be so excessive that it may fail to express any object, or may cause deception because of the lack of sufficient provisions in the body of the act to accord with the general title. If so, of course, the title is fatally defective.⁵⁴

§ 100. **Construction of the Title.**—While it is primarily the duty of the legislature to decide upon the wording and scope of the

⁴⁹ Howarth v City of DeLand (Fla.) 158 So. 294.

⁵⁰ Bowes v Aberdeen, 58 Wash. 535, 109 Pac. 369.

⁵¹ Carter County v Sinton, 120 U.S. 517, 30 L.Ed. 701, 7 S.Ct. 650; In re Bear, 216 Calif. 536, 15 Pac. (2) 489, 83 A.L.R. 1402; Van Pelt v Hilliard, 75 Fla. 792, 78 So. 693; People v McBride, 234 Ill. 146, 84 N.E. 865; Mammina v Alexander Auto Service Co., 333 Ill. 158, 164 N.E. 173, 61 A.L.R. 649; Bolivar Township Bd. v Hawkins, 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271; Vernor v Martindale, 179 Mich. 157, 146 N.W. 338; Lewis & Clark County v Industrial Acc. Bd., 52 Mont. 6, 155 Pac. 268; State v Minneapolis Elevator Co., 17 N.D. 23, 114 N.W. 482; New Castle v Withers, 291 Pa. 216, 139 Atl. 860, 57 A.L.R. 132; Shortall v Puget Sound Bridge Co., 45 Wash. 290, 88 Pac. 212; Diana Shooting Club v Lamoreaux, 114 Wis. 44, 89 N.W. 880. And see State ex rel Municipal Bond, etc., Co. v Knott (Fla.) 154 So. 143, where title was inartificially drawn as well as being deceptive.

⁵² Albert v Milk Control Board (Ind.) 200 N.E. 688; Fidelity Adjustment Co. v Cook (Mo.) 95 S.W. (2) 1162.

⁵³ Mayo v Polk Co., 124 Fla. 534, 169 So. 41, appeal dis. 57 S.Ct. 39; Shea v Olson (Wash.) 53 Pac. (2) 615.

^{53a} Glasscock v State (Ala.) 48 So. 700. Also see Greeley Transportation Co. v People, 79 Colo. 307, 245 Pac. 720; Crawford v Nashville, etc., R. Co., 153 Tenn. 642, 284 S.W. 892. But generality must not be a mere guise to cover incongruous legislation, State ex rel Crump v Sullivan, 99 Fla. 1070, 128 So. 478, or to work deception. Whitney v Hillsborough County, 99 Fla. 628, 127 So. 486.

⁵⁴ Discount & Credit Corp. v Ehrlich (Del.) 187 Atl. 591. Also see Balliet v Fetter, 314 Pa. 284, 171 Atl. 466.

title of a statute,⁵⁵ the court may be called upon to determine whether the constitutional requirement that the subject shall be expressed in the title, has been met. But, before an enactment will be held invalid, the insufficiency of the title must be clear and certain.⁵⁶ If there is any doubt, it should be resolved in favor of the act's validity.⁵⁷ Its language is to be liberally and reasonably construed,⁵⁸ and the title must be construed as a whole.⁵⁹ Its sufficiency is to be determined from the title's own language,⁶⁰ without resort to the body of the statute,⁶¹ or to extrinsic documents, even

⁵⁵ *Montclair v Ramsdell*, 107 U.S. 147, 27 L.Ed. 431, 2 S.Ct. 391; *People v People's Gas Light Co.*, 205 Ill. 482, 68 N.E. 950; *Henderson v State*, 137 Ind. 552, 36 N.E. 257; *Davy v McNeill*, 31 N.M. 7, 240 Pac. 482; *State v Schlitz Brewing Company*, 104 Tenn. 715, 59 S.W. 1033. The legislature may make the title of an act as comprehensive or as restrictive as it chooses. *Lee v Cloverleaf, Inc. (Fla.)* 177 So. 722.

⁵⁶ *State v Fontenot*, 132 La. 481, 61 So. 534; *O'Connor v St. Louis Transit Co.*, 198 Mo. 622, 97 S.W. 150; *State v Fargo Bottling Works Co.*, 19 N.D. 396, 124 N.W. 387.

⁵⁷ *Duval County v Jacksonville*, 36 Fla. 196, 18 So. 339, 29 L.R.A. 416; *Ritchie v People*, 155 Ill. 98, 40 N.E. 454.

⁵⁸ *First National Bank v Smith*, 217 Ala. 482, 117 So. 38; *Jerome H. Sheip Co. v Amos (Fla.)* 130 So. 699; *Lynch v Chase*, 55 Kan. 367, 40 Pac. 666; *Watkins v Bigelow*, 93 Minn. 210, 100 N.W. 1104; *In re Ortiz*, 31 N.M. 427, 246 Pac. 908; *State v Peake*, 18 N.D. 101, 120 N.W. 47; *Bitter v Bexar County (Tex.)* 11 S.W. (2) 163; *Lucchesi v Common.*, 122 Va. 872, 94 S.E. 925; *State v Haskins*, 92 W.Va. 632, 115 S.E. 720; *In re Southern Wisc. Power Co.*, 140 Wis. 265, 122 N.W. 809; and see *Allegheny County Home's Case*, 77 Pa. 77. The title is not to be construed in a strict or technical manner. *State ex rel Weeks v Olson*, 65 N.D. 407, 259 N.W. 83. It should be liberally construed to determine whether the "subject" is expressed in the title, *Mercer v State*, 111 Tex. Cr. 657, 13 S.W. (2) 689, or whether the title contains more than one subject. *Katz v State*, 122 Tex. Cr. 231, 54 S.W. (2) 130. It should also be construed in the light of the general purpose sought to be exercised by the legislature. *State v Shafer*, 63 N.D. 128, 246 N.W. 874.

⁵⁹ *Gibson v State*, 214 Ala. 38, 106 So. 231. And a "Table of Contents" immediately following the title should be considered as belonging to the title. *Common. v Dallas Township*, 18 Pa. Dist. & Co. 525. Moreover, the court may also look to the history of the legislation in order to determine if the title reflects the subject matter of the act. *McClure v Riley*, 198 Calif. 23, 243 Pac. 429. Also see *In re Cypress Farms (Dela.)* 180 Atl. 536.

⁶⁰ *People v Joyce*, 246 Ill. 124, 92 N.E. 607. Words should not be interpolated unless they are necessarily understood. *State v Burgdoerfer*, 107 Mo. 1, 17 S.W. 646, 14 L.R.A. 846.

⁶¹ *People v Joyce*, 246 Ill. 124, 92 N.E. 607. But see contra: *State v Closser*, 179 Ind. 230, 99 N.E. 1057; *Austin v McCall*, 95 Tex. 575, 68 S.W. 791. And see *Otoe County v Baldwin*, 111 U.S. 1, 28 L.Ed. 331, 4 S.Ct. 265.

though referred to in the title.⁶² And the words used must be given their ordinary meaning.⁶³ Hence, a narrow and technical construction should be avoided.⁶⁴ Moreover, the addition of the words "and so forth", or "for other purposes", or words of similar import or signification, will not save a title from contravening the constitutional provision. Such words do not extend or restrict the title.⁶⁵

§ 101. Variance Between Title and Subject.—If the title is concerned with one subject and the body of the statute deals with another, the act will fail because the subject is not expressed in the title.⁶⁶ The language of the title, however, does not have to be incorporated either literally or substantially in the body of the act.⁶⁷ It is sufficient if the title fairly indicates the subject matter. Nevertheless, in the drafting of statutes, considerable caution

⁶² *Pennington v Woolfolk*, 79 Ky. 13; *Tingue v Port Chester*, 101 N.Y. 294, 4 N.E. 625; *Gunter v Texas Land Co.*, 82 Tex. 496, 17 S.W. 840.

⁶³ *Moore-Mansfield Const. Co. v Indianapolis R. Co.*, 179 Ind. 356, 101 N.E. 296; *Lewis & Clark County v Industrial Acc. Bd.*, 52 Mont. 6, 155 Pac. 268; *State v Twining*, 73 N.J.L. 683, 64 Atl. 1073. But note *State v Bartholomew*, 176 Ind. 182, 95 N.E. 417; *Rathbone v Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L.R.A. 674, where the meaning given was not the most common one, in an effort to uphold the enactment through a liberal construction. To same effect, see *People v Chicago*, 349 Ill. 304, 182 N.E. 419, *Atlas Powder Co. v Surety Co. (Tenn.)* 51 S.W. (2) 841.

⁶⁴ *Fiscal Court v Pendleton County Bd. of Educ.*, 240 Ky. 589, 42 S.W. (2) 885.

⁶⁵ *Spier v Baker*, 120 Calif. 370, 52 Pac. 659, 41 L.R.A. 196; *Pitkin County v Aspen*, 3 Colo. Ap. 223, 32 Pac. 717; *State v Arnold*, 140 Ind. 628, 38 N.E. 820; *Shepherd v Helmers*, 23 Kan. 504; *Ryerson v Utley*, 16 Mich. 269; *Lincoln Bldg. Assoc. v Graham*, 7 Neb. 173; *Fishkill v Fishkill Road Co.*, 22 (N.Y.) Barb. 634. Also see *Note Ann. Cas.* 1912C, 175. But see *Blair v State*, 90 Ga. 326, 17 S.E. 96; *Banks v State*, 124 Ga. 15, 52 S.E. 74; *State v Garrett*, 29 La. Ann. 233; *City of St. Louis v Tiefel*, 42 Mo. 637; *Common. v Green*, 58 Pa. 378; *Bannon v Bannon*, 45 R.I. 83, 120 Atl. 66; *Garvin v State (Tenn.)* 13 Lea 162. But note *Wilson v Harris*, 170 Ga. 800, 154 S.E. 388.

⁶⁶ *Lamar Canal Co. v Amity Land Co.*, 26 Colo. 370, 58 Pac. 600; *State v Great Western Coffee Co.*, 171 Mo. 634, 71 S.W. 1011; *Bell v First Judicial Dist. Ct.*, 28 Nev. 280, 81 Pac. 875; *Fidelity Ins. Co. v Shenandoah Valley R. Co.*, 86 Va. 1, 9 S.E. 759; *State v Tieman*, 32 Wash. 294, 73 Pac. 375.

⁶⁷ See *Graves v People*, 32 Colo. 127, 75 Pac. 412.

should be exercised to make certain that the title and the body are equal in scope. If the title is broader or more extensive than the act, the act may be rendered unconstitutional,⁶⁸ unless such title fairly indicates the scope and purposes of the act so that the reader would expect legislation on the matters mentioned in the title.⁶⁹ But the title must clearly mislead before it will be declared invalid on the ground that it is too comprehensive.⁷⁰ Similarly, a statute

⁶⁸ *State v Dolan*, 13 Idaho 693, 92 Pac. 995. If the title is misleading, it will be fatal. *Liberty Highway Co. v Michigan Public Util. Comm.*, 294 Fed. 703; *Mobile Transp. Co. v Mobile*, 128 Ala. 335, 30 So. 645; *Abeel v Clark*, 84 Calif. 226, 24 Pac. 383; *Jones v State*, 93 Fla. 603, 112 So. 556; *People v McBride*, 234 Ill. 146, 84 N.E. 865; *Torphy v State (Ind.)* 156 N.E. 925; *State v Reno County*, 98 Kan. 648, 158 Pac. 861; *State v Kilshaw*, 158 La. 203, 103 So. 740; *Jasnowski v Connolly*, 192 Mich. 139, 158 N.W. 229; *State v Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527; *State v Bronson*, 115 Mo. 271, 21 S.W. 1125; *State v Erickson*, 75 Mont. 429, 244 Pac. 287; *Appel v Barker*, 92 Neb. 669, 138 N.W. 1133; *Nuendorff v Duryea*, 69 N.Y. 557; *Eaton v Guarantee Co.*, 11 N.D. 79, 88 N.W. 1029; *Ex Parte Ambler*, 11 Okla. Cr. 449, 148 Pac. 1061; *State v Frazier*, 36 Ore. 178, 59 Pac. 5; *State v Becker*, 3 S.D. 29, 51 N.W. 1018; *Brownsville v Reid*, 158 Tenn. 445, 14 S. W. (2) 730, reh. den. 159 Tenn. 99, 15 S.W. (2) 745; *Lowery v Red Cab Co. (Tex.)* 262 S.W. 147; *Cudihee v Phelps*, 76 Wash. 314, 136 Pac. 367; *McEldowney v Wyatt*, 44 W.Va. 711, 30 S.E. 239, 45 L.R.A. 609. For cases which hold the law valid in face of a title which is broader than the subject, see: *Smith v Chase*, 91 Fla. 1044, 109 So. 94; *People v Chicago*, 349 Ill. 304, 182 N.E. 419; *Wayne Township v Brown*, 205 Ind. 437, 186 N.E. 481; *Putnan v Salina*, 136 Kan. 637, 17 Pac. (2) 827; *Earhart v Middendorf*, 234 Ky. 78, 27 S.W. (2) 657. Unnecessary or superfluous recitals may be disregarded as surplusage. *Terminal Drilling Co. v Jones*, 84 Colo. 279, 269 Pac. 894; *Goetz v Smith*, 152 Tenn. 451, 278 S.W. 417. Similarly, statutory provisions not embraced in the title or in matter properly connected therewith, are inoperative. *Williams v Dormany*, 99 Fla. 496, 126 So. 117, or are a nullity. *Korth v Portland*, 123 Ore. 180, 261 Pac. 895, 58 A.L.R. 665. And the title of an act may limit the scope of the act but cannot extend or broaden its effect as expressed in the body. *Robertson v Circuit Court (Ind.)* 17 N.E. (2) 805.

⁶⁹ *Seaboard Air Line Ry. v Simon*, 56 Fla. 545, 47 So. 1001; *People v Roth*, 249 Ill. 532, 94 N.E. 953; *State v Bartholomew*, 176 Ind. 182, 95 N.E. 417; *State v Heldenbrand*, 62 Neb. 136, 87 N.W. 25; *State v Schlitz*, 104 Tenn. 715, 59 S.W. 1033.

⁷⁰ See *State v Burgdoerfer*, 107 Mo. 1, 17 S.W. 646, 14 L.R.A. 846. And note *State ex rel Municipal Bond, etc., Co. v. Knott (Fla.)* 154 So. 143.

may be unconstitutional if the title is less comprehensive than its body;⁷¹ at least, so much thereof as is not expressed in the title.⁷²

§ 102. **Plurality of Subjects Expressed in the Title.**—The constitutional requirement that no act shall contain more than one subject pertains to the body of the act and not to the title.⁷³ Consequently, if several subjects are expressed in the title, the act will not be rendered void if the body is referable to one of the subjects.⁷⁴ Any subject expressed in the title and not covered by the enactment will be disregarded as surplusage.⁷⁵ But where the title as well as the body of a statute contain the same two subjects, unless the court can ascertain which of the two is the primary object, both will fall.⁷⁶

§ 103. **Title and Subject of Amendatory Acts.**—The constitutional requirement concerning the title and subject matter of an act, also applies to amendatory acts.⁷⁷ Generally, the requirement seems to be sufficiently complied with if the amendatory act iden-

⁷¹ *Mobile Dry-Docks Co. v Mobile*, 146 Ala. 198, 40 So. 205; *Pavia v Calif. Dorr Co. (Calif.)* 242 Pac. 887; *Seaboard Air Line Ry. v Simon*, 56 Fla. 545, 47 So. 1001; *Blair v State*, 90 Ga. 326, 17 S.E. 96; *Dixon v Poe*, 159 Ind. 492, 65 N.E. 518; *Bosworth v State Univ.*, 166 Ky. 436, 179 S.W. 403; *Luman v Hitchens Bros. Co.*, 90 Md. 14, 44 Atl. 1051, 46 L.R.A. 393; *State v Weber*, 205 Mo. 36, 102 S.W. 955; *State v Tibbets*, 52 Neb. 228, 71 N.W. 990; *State v Burley*, 80 S.C. 127, 61 S.E. 255; *Pierson v Minnehaha County*, 28 S.D. 534, 134 N.W. 212; *Giddings v San Antonio*, 47 Tex. 548; *Lacey v Palmer*, 93 Va. 159, 24 S.E. 930; *Bradley Engineering Co. v Muzzy*, 54 Wash. 227, 103 Pac. 37.

⁷² See *supra*, § 96.

⁷³ *Judson v Bessemer*, 87 Ala. 240, 6 So. 267, 4 L.R.A. 742; *Monaghan v Lewis*, 5 Penn. (Defa.) 218, 59 Atl. 948; *People v McBride*, 234 Ill. 146, 84 N.E. 865; *People v Stimer*, 248 Mich. 272, 226 N.W. 899, 67 A.L.R. 552.

⁷⁴ *Gibson v State*, 214 Ala. 38, 106 So. 231; *People v Solomon*, 265 Ill. 28, 106 N.E. 458; *Murray v Nelson*, 107 Neb. 52, 185 N.W. 319; *State v Turner*, 37 N.D. 635, 164 N.W. 924; *Foster v Graham*, 154 Tenn. 412, 285 S.W. 570, 47 A.L.R. 971.

⁷⁵ See cases under note 96, *supra*.

⁷⁶ *Reilly v Knapp (Kan.)* 185 Pac. 47; *State v Caldwell (Neb.)* 22 N.W. 228.

⁷⁷ *Egekqvist Bakeries, Inc., v Benson (Minn.)* 243 N.W. 853.

tifies the original act by title and declares that it is to be amended,⁷⁸ provided that the new matter is also germane to the title of the original enactment.⁷⁹ In other words, any matter may be included in the amendment which could have been included in the original act.⁸⁰ But in order to include matter not germane to the original

⁷⁸ *Discount & Credit Corp. v Ehrlich* (Del.) 187 Atl. 591. Constitutional provisions in many states, however, prohibit amendment by title only, and require that the part amended shall be reenacted. See *State v Rogers*, 107 Ala. 909, 19 So. 909, 32 L.R.A. 520; *Scown v Czarnecki*, 264 Ill. 305, 106 N.E. 276; *Re Lee* (Okla.) 168 Pac. 53; *Manchester Township v Wayne County Commrs.*, 257 Pa. St. 442, 101 Atl. 736. In one state, at least, the constitution provides that no act shall be amended by mere reference to its title, but that the act, or section, amended shall be set forth and published at length. *Indiana Const.* (1851) Art. 4, § 21. Though the only reference in the constitutional provision to the title of the original act is prohibitory, the courts have laid down the doctrine that the amendatory statute must recite the full title of the original act, *Lindquist v State*, 153 Ind. 542, 55 N.E. 426, even in *ipsissimis verbis*. *O'Mara v Wabash R.R.*, 150 Ind. 648, 50 N.E. 821. Also see *The Form of Amendatory Statutes* (1929) 43 Harv. L.Rev. 482. These provisions are mandatory. *Judson v Bessemer*, 87 Ala. 240, 6 So. 267, 4 L.R.A. 742; *People v Election Commrs.*, 221 Ill. 9, 77 N.E. 321; *State v Tibbetts*, 52 Neb. 228, 71 N.W. 990; *Titusville Iron Works v Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917, 1 L.R.A. 361; *Beale v Pankey*, 107 Va. 215, 57 S.E. 661; *Copland v Pirie*, 26 Wash. 481, 67 Pac. 227. And the new title alone will determine the scope of the new law. *Underwood v McDuffee*, 15 Mich. 361.

⁷⁹ *Dunning v Holcombe*, 203 Ala. 546, 84 So. 740; *Gale v Beerbohm*, 43 Colo. 521, 96 Pac. 449; *State v Allen*, 83 Fla. 214, 91 So. 104, 26 A.L.R. 735; *Holland v State*, 155 Ga. 795, 118 S.E. 203; *State v Closser*, 179 Ind. 230, 99 N.E. 1057; *State Board of Charities v Combs*, 193 Ky. 548, 237 S.W. 32; *People v Howard*, 73 Mich. 10, 40 N.W. 789; *In re Austin*, 116 Neb. 137, 216 N.W. 171; *People v Whitlock*, 92 N.Y. 191; *State v Mohler*, 115 Ore. 562, 237 Pac. 690, 239 Pac. 193; *Common. v Dale*, 272 Pa. 189, 115 Atl. 873; *State v Oliver*, 35 S.W. (2) 396, 162 Tenn. 100; *Fehr v State*, 36 Tex. Cr. 93, 35 S.W. 381. And note the majority's view in *Egekvist Bakeries, Inc., v Benson* (Minn.) 243 N.W. 853, following *State v Smith*, 35 Minn. 257, 28 N.W. 241, that an amendatory act entitled as such and nothing more, must remain not only within the title but be also germane to the actual subject matter of the amended act; that it made no difference that the legislature had added explanatory words, as they meant to point out an old law to be changed rather than a new subject matter. But note *Andrews v Ada County*, 7 Idaho 453, 63 Pac. 592.

⁸⁰ *Evanston v Wazan*, 364 Ill. 198, 4 N.E. (2) 78; *State v Closser*, 179 Ind. 230, 99 N.E. 1057; *Westgate v Adrian Township*, 161 Mich. 333, 126 N.W. 422; *State v Mullinix*, 301 Mo. 385, 257 S.W. 121; *Willis v Rochester*, 157 N.Y. S. 815, 93 Misc. 239; *McLaughlin v Helgersen*, 116 Ore. 310, 241 Pac. 50; *Common. v Bell*, 288 Pa. 29, 135 Atl. 645; *State v McCornish*, 59 Utah 58, 201 Pac. 637.

act's title, the title must also be amended to include the new matter.⁸¹ If the title of the amendatory act indicates that only certain sections are to be amended, no other sections can be amended.⁸² Similarly, if the title of the amendatory act specifies the particulars in which the old act is to be amended, the new act can contain no other matter.⁸³

§ 104. Title and Subject of Repealing Acts.—Acts of this character must also meet the constitutional requirement of only one subject, which shall be expressed in the title. If, therefore, the title of the repealing act indicates that its purpose is simply to repeal an existing law, no new legislation can be enacted by the repealing act.⁸⁴ Similarly, if only certain sections are mentioned in the title of the repealing act, no other sections can be repealed.⁸⁵ Frequently, however, enactments will contain provisions to the effect that all laws and parts of laws in conflict with the new enactment, are thereby repealed. This repeal does not need to be expressed in

⁸¹ See *O'Donnell v Powell*, 282 Fed. 1, app. dis. 264 U.S. 588, 68 L.Ed. 854, 44 S.Ct. 332; *State ex rel Mueller Baking Co. v Calvird (Mo.)* 92 S.W. (2) 184.

⁸² *Wood v McClure*, 209 Ala. 523, 96 So. 577; *Dolese v Pierce*, 124 Ill. 140, 16 N.E. 218; *State v Bankers Mut. Ben. Assn.*, 23 Kan. 499; *Walters v Brown*, 215 Ky. 196, 284 S.W. 1017; *State v Tolman*, 124 La. 630; *Day v Metrop. Util. Dist.*, 115 Neb. 711, 214 N.W. 647, 216 N.W. 556; *Ex parte Hewlett*, 22 Nev. 333, 40 Pac. 96; *Pottawatomie County v Alexander*, 68 Okla. 126, 172 Pac. 436; *Ex parte Master*, 126 Okla. 80, 258 Pac. 861; *Riverland Oil Co. v Williams (Okla.)* 56 Pac. (2) 1167. And where the amendatory act stated that it was an act, amending certain sections, notwithstanding that one amended section was omitted from the enumeration in the title of the sections to be amended, the constitutional requirement was sufficiently met. *Davis v State Board of Med. Exam. (Okla.)* 74 Pac. (2) 610.

⁸³ *Common. v Bender*, 7 Pa. Co. 620; *Hays v Federal Chemical Co.*, 151 Tenn. 169, 268 S.W. 833; *City of Cross Plains v Radford (Tex.)* 73 S.W. (2) 1093.

⁸⁴ *Chicago, etc., R. Co. v Smyth*, 103 Fed. 376; *Stiefel v Maryland Institute*, 61 Md. 144. See also *State v Benzinger*, 83 Md. 481, 35 Atl. 173.

⁸⁵ *Baltimore v Williams*, 124 Md. 502, 92 Atl. 1066.

the title.⁸⁶ In fact, the intent to repeal all inconsistent laws is necessarily implied from the passage of the new enactment,⁸⁷ and their repeal is always germane to the subject of the new law.⁸⁸

⁸⁶ *Southern Pac. Co. v Bartine*, 170 Fed. 725; *State v Duval County*, 23 Fla. 483, 3 So. 193; *State v Tucker*, 46 Ind. 355; *Graham v Jewell*, 204 Ky. 260, 263 S.W. 693; *Washington County v Franklin R. Co.*, 34 Md. 159; *Union Pac. R. Co. v Sprague*, 69 Neb. 48, 95 N.W. 46; *State v Steele*, 39 Ore. 419, 65 Pac. 515; *Bank of Millvale v Ohio Valley Bank*, 234 Pa. 1, 82 Atl. 1115; *Baker v Kirschnek*, 317 Pa. 225, 176 Atl. 489; *Geffert v Yorktown School Dist. (Tex. Civ. Ap.)* 285 S.W. 345; *Maxwell v Lancaster*, 81 Wash. 602, 143 Pac. 157; *Yellow River Improvement Co. v Arnold*, 46 Wis. 214, 49 N.W. 971.

⁸⁷ *Union Pac. R. Co. v Sprague*, 69 Neb. 48, 95 N.W. 46. Also see cases under note 86, *supra*. Hence, the statement in the law that all laws inconsistent therewith were repealed, is unnecessary and mere surplusage. *Bowman v Hamlett*, 159 Ky. 184.

⁸⁸ *Monaghan v Lewis*, 5 Penn. (Dela.) 218, 59 Atl. 948; *Gabbert v Jeffersonville R. Co.*, 11 Ind. 365; *Martin v Tyler*, 4 N.D. 278, 60 N.W. 392, 25 L.R.A. 838; *Common. v Moir*, 199 Pa. St. 534, 49 Atl. 351, 53 L.R.A. 837; *Baker v Kirschnek*, 317 Pa. 225, 176 Atl. 489.

CHAPTER XI

TIME WHEN STATUTE BECOMES EFFECTIVE (INCLUDING COMPUTATION OF TIME)

- § 105. In General.
- § 106. When No Time is Fixed.
- § 107. Provisions for Immediate Effectiveness, Generally.
- § 108. Emergency Laws.
- § 109. Provisions Delaying Effectiveness.
- § 110. Laws Enacted at the Same Session.
- § 111. Amendments.
- § 112. Repeals.
- § 113. Computation of Time.
- § 114. Retrospective Operation, Generally.

§ 105. **In General.**—Of course, the enactment of a statute is not the same as its taking effect as law.¹ As will be seen hereafter, statutes do not always take effect upon their enactment but the effective date may be postponed either by virtue of their own provisions, or by the terms of a general law or a constitutional requirement upon the subject. In fact, constitutional provisions governing the time for statutes to take effect will be found in at least thirty-one states,² and most of the others fix the effective date by general states.³ And, in the absence of a constitutional prohibition, the legislature has the inherent power to determine when its enact-

¹ *State v Williams*, 173 Ind. 414, 90 N.E. 754; *State ex rel Brunjes v Bockelman* (Mo.) 240 S.W. 209. And note *Board of Regents v Engle*, 224 Ky. 184, 5 S.W. (2) 1062, that a statute not effective cannot be considered by the court. Yet such a statute has a potential existence upon its passage, even though its effective date is postponed. *Broadwater v Kandig*, 80 Mont. 515, 261 Pac. 264; *State ex rel v Dirck*, 211 Mo. 568, 111 S.W. 1. But note *Keane v Cushing*, 15 Mo. Ap. 96.

² Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin.

³ But in Delaware, Georgia, Pennsylvania and Rhode Island, there is apparently neither a constitutional provision, nor a general statute, so that enactments usually take effect upon passage. See § 106, *infra*.

ments will become effective.⁴ This may be done by the terms of the statute itself or by another statute.⁵ Moreover, the same general principles applicable to statutes generally as to the time they shall become effective, are equally applicable to amendatory acts,⁶ repeals, codifications, and revisions.

§ 106. When No Time Is Fixed.—In the absence of a constitutional or a general statutory provision, or a provision in the statute itself relating to the effective date, the statute will take effect from the day of its passage or enactment;⁷ that is, from the date the last act necessary to complete the legislative process is performed.⁸ What constitutes this final act will vary in different situations. Generally, an act will become a law when approved by the

⁴ *Roth Drugs v Johnson*, 13 Calif. Ap. (2) 720, 57 Pac. (2) 1022. But of course, if the date fixed by the act is earlier than that of its passage, it becomes effective from the latter date. *Chicago, etc., R. Co. v U.S.*, 14 Ct. Cl. 125; *McLaughlin v Newark*, 57 N.J. L. 298, 30 Atl. 543. And the legislature may provide different effective dates for different sections. *State ex rel Elsas v Workmen's Comp. Comm.*, 318 Mo. 1004, 25 S.W. (2) 796.

⁵ *Elliot v Lochnane*, 1 Kan. 126; *State ex rel Otto v Kansas City*, 310 Mo. 542, 276 S.W. 389.

⁶ *Harrington Co. v Chopke*, 108 N.J. Eq. 297, 154 Atl. 849. Also see *State ex rel Nejdl v Bowman*, 199 Ind. 436, 156 N.W. 394, 157 N.E. 723.

⁷ *Matthews v Zane (U.S.)* 7 Wheat. 164, 8 L.Ed. 425; *Robertson v Bradbury*, 132 U.S. 491, 33 L.Ed. 405, 10 S.Ct. 158; *Gay v Engebretsen*, 158 Calif. 21, 109 Pac. 876; *Wright v Overstreet*, 122 Ga. 633, 50 S.E. 487; *Parkinson v State*, 14 Md. 184. See also *State ex rel Otto v Kansas City*, 310 Mo. 542, 276 S.W. 389. Under the former rule in this country, and in accord with the common law of England, in the absence of a provision in the statute itself with reference to when it would become effective, it became effective from the first day of the session at which it was enacted. *The Ann Fed. Cas. No. 397*, *Turnipseed v Jones*, 101 Ala. 593; *Weeks v Weeks*, 40 N.C. 111; *Duffy v Cooke*, 239 Pa. St. 427, 86 Atl. 1076; *Latless v Holmes (Eng.)* 4 T.R. 660, 100 Eng. Reprint 1230. And note *Emergency Legislation*, 44 Harv. L.Rev. 851 (1931).

⁸ *Louisville v Savings Bank*, 104 U.S. 469; *People v Clark*, 1 Calif. 406; *Heard v Heard*, 8 Ga. 380; *Goodsell v Boynton*, 2 Ill. 555; *Tarlton v Peggs*, 18 Ind. 24; *Dowling v Smith*, 9 Md. 242; *Baker v Compton*, 52 Tex. 252.

chief executive,⁹ or when passed over his veto,¹⁰ or when approved by the people.¹¹ If, however, the bill becomes a law because of the governor's non-action, it will not become effective until the period prescribed for his approval or veto has expired.¹²

Promulgation, in the absence of constitutional or statutory requirement, is not necessary to put a statute in operation,¹³ although it might be grounds entitling the defendant in a criminal action to merciful consideration, in the event he should be found guilty.¹⁴ And the same is true generally with regard to publication.¹⁵

⁹ *Memphis v U.S.*, 97 U.S. 293, 24 L.Ed. 920; *Bristol v U.S.*, 2 Fed. Supp. 781; *Phoenix Carpet Co. v State*, 118 Ala. 143, 22 So. 627; *Pacific Palisades Assn. v Huntington Beach*, 196 Calif. 211, 237 Pac. 538, 40 A.L.R. 782; *People v Kramer*, 238 Ill. 512, 160 N.E. 60; *Simon v Maryland Battery Service Co.*, 276 Pa. 473, 120 Atl. 469; *Forrester v City of Memphis*, 159 Tenn. 16, 15 S.W. (2) 739. This is the result even in the face of the constitutional requirement that the law be signed by the respective speakers, since their signing is merely ministerial. *Lewis v Woodfolk*, 58 Tenn. 25. An excellent discussion of the president's approval as the date of a statute's efficacy, will be found in *In re Richardson*, Fed. Cas. No. 11,777.

¹⁰ *Floyd County v Salmon*, 151 Ga. 313, 106 S.E. 280; *Wartman v Philadelphia*, 33 Pa. 202.

¹¹ *Dozier v Ragdale (Ark.)* 55 S.W. (2) 779; *Armstrong v Mitten (Colo.)* 37 Pac. (2) 757; *Town of San Mateo v State ex rel Landis (Fla.)* 158 So. 112; *State ex rel Elsas v Workmen's Comp. Comm.*, 318 Mo. 1004, 25 S.W. (2) 796.

¹² *Floyd County v Salmon*, 151 Ga. 313, 106 S.E. 280; *Stalcup v Dixon*, 136 Ind. 9, 35 N.E. 987, *Cincinnati Traction Co. v Public Utilities Comm.*, 113 Ohio St. 618, 150 N.E. 81. See also Note in 15 L.R.A. 243. And where the executive neither approves nor disapproves a statute, containing an emergency clause, and which declares that it shall be effective from its passage and approval, it became effective from the time it was returned from the executive to the secretary of state. *Ficke v Board of Trustees*, 262 Ky. 312, 90 S.W. (2) 66.

¹³ *The Ann. (Fed.) Cas.* No. 397.

¹⁴ *Rex v Bailey (Eng.) Russell & Ryan* 1. See also *Burns v Norvell (Eng.)* 5 Q.B.D. 444.

¹⁵ *Arnold v U.S. (U.S.)* 9 Cranch. 104, 3 L.Ed. 671; *People ex rel Campbell v Clark*, 1 Calif. 406; *In re Welman*, 20 Vt. 653. Publication takes place when the bound volumes are distributed to all counties by the Secretary of State. *State ex rel Brown v Bailey*, 16 Ind. 46. For constitutional provision that publication is not necessary, where time for act's effectiveness is fixed by the statute itself, see *Parkinson v State*, 14 Md. 184, 74 Am.Dec. 522.

But where the constitution and statutes make no provision for the exact ascertainment of time, the rules of the common law should be applied in determining what statute is applicable to a given controversy.¹⁶ Such rules are announced in the early case of *The Ann* (1 Gall. 62, Fed. Cas. No. 397):

“At common law, all acts of parliament, unless another period is fixed, took effect, by relation, to the first day of the session: so that if an act had been brought in at the close of the session, and passed on the last day, which made an innocent act criminal, or even a capital offence, and no day was fixed for the commencement of its operation, it had the same efficacy as if it had passed on the first day of the session; and all, who during a long session, had been doing an act, which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute. To be sure, this doctrine seems flatly unjust; but, as Christian says (1 Bl. Comm. 70, note 4) it is agreeable to ancient authorities. . . . The whole current of authorities therefore flows uniformly in one channel; and parliament listening at length to the voices of reason, by Stat. 33 Geo. III, c. 13, declared that the date of every statute should be endorsed on its receiving the royal assent, and from that time only should have effect.

Since the adoption of the constitution of the United States, which prohibits the passing of *ex post facto* laws, it seems to be considered, that statutes take effect immediately from the time of their date or passage and not before; in the same manner as they do now in England. But we shall hardly find a case, in which the promulgation of them has been held necessary, to give them operation. So early as 39 Edw. III., this precise objection was taken, and Sir Robert Thorpe, then chief justice, answered, “although proclamation be not made in the county, every one is bound to take note of that which is done in parliament; for as soon as the parliament hath concluded any thing, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm; and therefore it is not requisite that any proclamation be made, seeing the statute took effect before.”

§ 107. Provisions for Immediate Effectiveness, Generally.— Sometimes a statute will provide by its own terms that it shall become effective immediately. This means that the enactment will

¹⁶ *Monroe Loan Society v Nute* (N.H.) 183 Atl. 703.

become law upon completion of the legislative process,¹⁷ and the same rules will apply in ascertaining when this process is completed as do where there is no requirement whatsoever regarding the time the statute will go into effect.¹⁸

§ 108. Emergency Laws.—In the event a constitutional provision postpones the effective date until some time after the passage of the bill, the emergency clause is frequently used as a device to put the law into immediate force;¹⁹ that is, immediately upon its passage.²⁰ Hence, the law will become effective upon approval by the chief executive,²¹ or when duly passed over his veto.²² It is possible, however, that only a part of a statute will be subject to the emergency clause.²³ Where this is true, part may be postponed

¹⁷ *State v Hoss* (Ore.) 21 Pac. (2) 234. The use of the word "immediately" gives a statute force from the time of its approval by the executive. In *re Kenney's Estate*, 9 N.Y.S. 182. Sometimes the statute may provide that it shall go into effect upon passage, but the law seems to be the same as in those instances where the statute provides that it shall become effective immediately. The term "after its passage" has been held to mean after its approval by both houses and not from the date of the executive's approval. *State v Mounts*, 36 W.Va. 179, 14 S.E. 407, 15 L.R.A. 243. But it has also been held to mean from the date of approval by the executive. *U.S. v Stoddard* (U.S.) 89 Fed. 699; *People ex rel Campbell v Clark*, 1 Calif. 406; *Kennedy v Palmer* (Mass.) 6 Gray 316. And "subsequent to its passage," is construed to mean subsequent to its approval by the governor. *Walker v Miss. Valley, etc.*, R. Co., Fed. Cas. No. 17,079.

¹⁸ See § 106, *supra*.

¹⁹ *State ex rel v McIntosh*, 205 Mo. 616, 103 S.W. 1071. For history of the Emergency Clause, see 44 Harv. L.Rev. 851 (1931).

²⁰ See § 107, *supra*.

²¹ *Diaz v Cintron*, 24 Fed. (2) 957; *Orme v Salt Valley Water User's Assn.*, 25 Ariz. 324, 217 Pac. 935; *Stanley v Gates*, 179 Ark. 886, 19 S.W. (2) 1000; *State v Olson*, 44 N.D. 614, 176 N.W. 528; *Holbert v Patrick*, 72 Okla. 25, 177 Pac. 566; *Simpson v Winegar*, 122 Ore. 297, 258 Pac. 562; *State v State R. Comm.*, 52 Wash. 17, 100 Pac. 179. And especially note Justice Story's reasoning in *In re Richardson*, Fed. Cas. No. 11,777.

²² *State v Bowman*, 199 Ind. 436, 156 N.E. 394, 157 N.E. 723; *Singing Fund Com'rs v George*, 104 Ky. 260, 47 S.W. 779; *Biggs v McBride*, 17 Ore. 640, 21 Pac. 878, 5 L.R.A. 115. In the absence of the governor's approval, the law became effective when filed in the office of the secretary of state. *Glisson v Hancock* (Fla.) 181 So. 379.

²³ *Lemaire v Crockett*, 116 Me. 263, 101 Atl. 302. (Invalidity of emergency clause did not affect the validity of the rest of the act).

and part may go into immediate effect. Moreover, where the courts take the attitude that it is mandatory upon the legislature to comply strictly with the constitutional provisions pertaining to emergency legislation, if the legislature fails to meet the requirements of the constitution, the statute will not be regarded as in force until the arrival of the regular date fixed by the constitution for the effectiveness of legislation generally.²⁴ And the effectiveness of an emergency law will not be delayed by the filing of a petition for a referendum thereon.²⁵ But a sharp conflict exists in the authorities whether the legislative determination of an emergency is subject to judicial review;²⁶ some hold that the legislative determination is conclusive,²⁷ and others that it is not.²⁸ The partic-

²⁴ *Lemaire v Crockett*, 116 Me. 263, 101 Atl. 302; *State ex rel Harvey v Linville*, 318 Mo. 698, 300 S.W. 1066; *Riley v Carico*, 27 Okla. 33, 110 Pac. 738; *State ex rel Brislaw v Meath*, 84 Wash. 302, 147 Pac. 11.

²⁵ *Johnson v Diefendorf*, 56 Idaho 620, 57 Pac. (2) 1068. For further treatment of referendum and its effect on legislation, see § 67, *supra*. But see *State ex rel v Sullivan*, 283 Mo. 546, 224 S.W. 327, that the legislature cannot foreclose the constitutional right of referendum by simply adding an emergency clause to a legislative enactment.

²⁶ What is an emergency that will justify the immediate effectiveness of legislation? An emergency is a sudden and unexpected occasion for action. *Bowditch v Boston*, 101 U.S. 16; *City of Marion v Haynes*, 157 Ky. 687, 164 S.W. 79; *Parker v Mayor, etc.*, 128 La. 941, 55 So. 587; *Mallon v Board of Water Commissioners*, 144 Mo. Ap. 104, 128 S.W. 764; *Colfax v Butler County*, 83 Neb. 803, 120 N.W. 444; *State v Zangerle*, 95 Ohio St. 1, 115 N.E. 498. Also see *U.S. v Sheridan-Kirk Contract Co.*, 149 Fed. 809 ("continuing extraordinary emergency"). And for further treatment of emergency laws, particularly with reference to the police power, see Maurer, R. A., *Emergency Laws* (1935) 23 Geo. L.J. 671, 693. For examples of the abuse of the emergency clause, see *Emergency Legislation*, 44 Harv. Law Rev. 581, 584 (1931).

²⁷ *People v Pacheco*, 27 Calif. 175; *Kadlerly v Portland*, 44 Ore. 118, 74 Pac. 710; *Van Kleeck v Ramer*, 62 Colo. 4, 156 Pac. 1108. And see *Carpen-ter v Montgomery*, 7 Blackf. (Ind.) 415, in which it was held that, where the emergency clause has the procedural effect of making the bill immediately effective, the declaration is conclusive. Of course, if the constitution makes the legislative finding conclusive, the judiciary should not interfere. *Culp v Commissioners*, 154 Md. 620, 141 Atl. 410. But see *Lyons v Bayonne*, 101 N.J. L. 455, 130 Atl. 14, and *Pughe v Lyle*, 10 Fed. Sup. 245.

²⁸ *In re Hoffman*, 155 Calif. 114, 99 Pac. 517; *Attorney Gen. ex rel Barbour v Lindsay*, 178 Mich. 524, 145 N.W. 98. The legislature may not, by its mere pronouncement, create an emergency authorizing urgency legislation, where no emergency exists in fact. *Davis v Los Angeles County* (Calif.) 79 Pac. (2) 1102.

ular view adopted by the court may undoubtedly influence the effective date of emergency legislation. At least, there is authority that where a law was prevented by an injunction from taking effect on the date provided for in the act, the law was regarded as effective on the date the supreme court held the act valid.²⁹

§ 109. Provisions Delaying Effectiveness.—Constitutional and statutory provisions may also delay the effectiveness of a statute until it has been duly published,³⁰ or proclaimed,³¹ or until a certain date has arrived,³² or until the happening of a specified contingency, such as an affirmative vote of the people,³³ or until the expiration of a specified period of time after publication,³⁴ promulgation,³⁵ final passage,³⁶ or adjournment of the legislature.³⁷ Consequently, if the effectiveness of a statute depends on the publication thereof, it cannot take effect until it has been duly published.³⁸ On the other hand, in the absence of any constitutional

²⁹ *Wiseman v Phillips* (Ark.) 84 S.W. (2) 91 (sales tax law).

³⁰ For treatment of the publication of statutes, see § 45, *supra*.

³¹ See *State v Stevenson*, 2 Ark. 260; *State v Williams*, 173 Ind. 414, 90 N.E. 754.

³² *Smith v Thomas*, 317 Ill. 150, 147 N.E. 788; *Schaffner v Shaw*, 191 Iowa 1047, 180 N.W. 853; *McLaughlin v Newark*, 57 N.J. L. 298; *State v Whisman*, 36 S.D. 260, 154 N.W. 707.

³³ *City of Winter Haven v State ex rel Landis* (Fla.) 170 So. 100.

³⁴ *State v Little Rock R. Co.*, 31 Ark. 701; *Ex parte Sohncke*, 148 Calif. 262, 82 Pac. 956; *Board of Educ. v Morgan*, 316 Ill. 143, 147 N.E. 34; *Lienau v Moran*, 5 Minn. 482; *Swann v Buck*, 40 Miss. 268; *Andrews v St. Louis Tunnel Co.*, 16 Mo. Ap. 299; *Matter of Howe*, 112 N.Y. 100, 19 N.E. 513, 112 N.Y. 100, 2 L.R.A. 825; *Johnson v State*, 3 Lea (Tenn.) 469; *State v Mounts*, 36 W.Va. 179, 14 S.E. 407, 15 L.R.A. 243.

³⁵ *New Portland v New Vineyard*, 16 Me. 69.

³⁶ For discussion of final passage, see *supra*, § 108.

³⁷ *Bachelor v State*, 216 Ala. 356, 113 So. 67; *Santa Cruz County v McKnight*, 20 Ariz. 103, 177 Pac. 256; *Boggs v Common.*, 193 Ky. 502, 236 S.W. 1038; *State v Criddle*, 302 Mo. 634, 259 S.W. 429; *McGinn v State*, 46 Neb. 427, 65 N.W. 46; *Harper v Board of Comrs.*, 54 Okla. 545, 149 Pac. 1102, 154 Pac. 529; *State v Hecker*, 109 Ore. 520, 221 Pac. 808; *Beale v Johnson*, 45 Tex. Civ.Ap. 119, 99 S.W. 1045; *State v Motomatsu*, 139 Wash. 639, 247 Pac. 1032.

³⁸ *Welch v Battern*, 47 Iowa 147; *Cain v Goda*, 84 Ind. 209. That publication is not a condition precedent, See *State v Armstrong*, 31 N.M. 220, 243 Pac. 333.

provision on the subject, the statute by its own language may postpone its effectiveness.³⁹ In fact, it is an excellent legislative policy to delay the effectiveness of legislation rather than to give it immediate force and effect. And in most instances, where the effective date of legislation is postponed, the purpose of the delay is to give the people time within which to receive notice of the enactment of the law,⁴⁰ and to take such steps as might be necessary in order to protect their rights before the statute becomes effective.⁴¹ But where the time is fixed by the constitution, the legislature cannot prescribe a shorter period.⁴² Similarly, the legislature cannot fix a period beyond that prescribed by the constitution. It is, however, within the power of the legislature, as a general rule, to enact a law to become effective upon the happening of a future contingency.⁴³ And, as we have previously stated,⁴⁴ the effectiveness of a law may be delayed through the use of the referendum.

§ 110. **Laws Enacted at the Same Session.**—Where two statutes have been enacted on the same subject, or applicable to the same subject, at the same session of the legislature and perhaps even on the same day, it is often quite difficult to determine which is the law. They will usually, so it seems, take effect at the same

³⁹ See *Bachelor v State*, 216 Ala. 356, 113 So. 67; *State ex rel Brunjes v Bockelman* (Mo.) 240 S.W. 209; *State v Roney*, 82 Ohio St. 376, 92 N.E. 486; *State v Clausen*, 85 Wash. 260, 148 Pac. 28. And for cases involving the time of taking effect of an amendment *in futuro*, see *State ex rel Nejdil v Bowman*, 199 Ind. 436, 156 N.E. 394, 157 N.E. 723. Also see 37 Yale L.J. 127 (1927). The word "from" is one of exclusion, *Peables v Hannaford*, 18 Me. 106, while the words "until", "till" and "to", are inclusive. *Webster v French*, 12 Ill. 302; *Bunce v Reed*, 16 Barb. (N.Y.) 347. Also note *People v Walker*, 17 N.Y. 502. For meaning of "at least", see *Stebbins v Anthony*, 5 Colo. 348; *Walsh v Boyle*, 30 Md. 266; *O'Connor v Towns*, 1 Tex. 107.

⁴⁰ *The Ann*, Fed. Case No. 397, *Price v Hopkins*, 13 Mich. 318, *City of Roanoke v Elliott*, 123 Va. 393, 96 S.E. 819; *Allen v Mottley Constr. Co.*, 160 Va. 875, 170 S.E. 412.

⁴¹ *Allen v Mottley Constr. Co. (Va.)* 170 S.E. 412.

⁴² *State v Montoya*, 22 N.M. 215, 160 Pac. 359.

⁴³ *State Docks Comm. v State ex rel Jones* (Ala.) 150 So. 537; *People v Barnett*, 344 Ill. 62, 176 N.E. 108; *State ex rel State Bldg. & Loan Comm. v Smith* (Mo.) 74 S.W. (2) 27.

⁴⁴ See *supra*, Chapt. III, § 21. Also see Notes in 50 L.R.A.(n.s.) 209, and L.R.A. 1917 B, 25.

time.⁴⁵ Similarly, where two bills are signed by the executive on the same day, they will also be regarded as having become effective simultaneously.⁴⁶ But, of course, the legislature may declare the order of time in which two, or more, statutes so enacted shall become law.⁴⁷ And, obviously, an act containing an emergency clause will by virtue thereof supersede one which does not.⁴⁸ If neither of two acts of this type contain such a clause, but one relates to particular places and persons, or, in other words, is a local or special law, and the other act is general, both will be construed as constituting but one law,⁴⁹ and hence as becoming effective simultaneously. Moreover, even the chapter numbers of two statutes enacted at the same legislative session have been considered determinative of the order of effectiveness.⁵⁰

§ 111. **Amendments.**⁵¹ — The general rules applicable to the effectiveness of statutes generally are equally applicable to amendatory legislation. For instance, they will take effect only from the

⁴⁵ *Greene v E. H. Taylor, Jr.*, 184 Ky. 739, 212 S.W. 925; *Naylor v Board of Educ.*, 216 Ky. 766, 288 S.W. 690; *Stuart v Chapman*, 104 Me. 17, 70 Atl. 1069. But the one of latest enactment prevails. *Fidelity & Deposit Co. v Logan*, 230 Ky. 776, 20 S.W. (2) 753.

⁴⁶ *Mahoney v Common. (Va.)* 174 S.E. 817. But note *Strauss v Heisse*, 48 Md. 292, and *Syndicate Printing Co. v Cashman*, 115 Minn. 446, 132 N.W. 915, that numerical order of approval will control. That the last signed by the governor controls, see *Southwark Bank v Common.*, 26 Pa. 446.

⁴⁷ *People v Jaehne*, 103 N.Y. 182, 8 N.E. (2) 374.

⁴⁸ *Peavy v McCombs*, 26 Idaho 143, 140 Pac. 965; *Newbauer v State*, 200 Ind. 118, 161 N.E. 826; *Campbell County Elec. Comm. v Weber*, 240 Ky. 373, 42 S.W. (2) 511; *Whitfield v Davies*, 78 Wash. 256, 138 Pac. 883. Also see *People v I. C. Railroad Co.*, 337 Ill. 276, 169 N.E. 178.

⁴⁹ *Ingram v Common.*, 176 Ky. 706, 197 S.W. 411. But note *Chilson v Jerome (Calif.)* 283 Pac. 862, that a statute having special application controls one of general application without regard to their respective dates of passage.

⁵⁰ *Metropolitan Board of Health v Schmades (N.Y.)* 3 Daly 282. Also see *Gibbons v Brittenum*, 56 Miss. 232, that "the Code was adopted by the Legislature *uno flatu*, and speaks with a simultaneous voice in all of its provisions", as a general rule.

⁵¹ For further treatment of amendments, see *infra*, Chapter XII, and Chapter XXVII.

time of enactment and approval by the executive,⁵² except where their effectiveness is set *in futuro*.⁵³

§ 112. **Repeals.**⁵⁴—As a general rule, the principles pertaining to the effective dates of statutes generally are also applicable to repealing acts. For instance, immediate effectiveness may be obtained by the use of an emergency clause.⁵⁵ The effectiveness of a repeal may also be postponed to some future date.⁵⁶ But where the legislature repeals and re-enacts the same legislation at the same session of the legislature, a problem peculiar to repeals may be created necessitating the determination of the effective period of the law. Generally, however, in such cases, a repeal will be neutralized where a subsequent re-enactment becomes operative at or before the repeal's effective date.⁵⁷ On the other hand, where any time elapses before the re-enactment, the repeal will be operative during the interim.⁵⁸

§ 113. **Computation of Time.**—The weight of authority adheres to the rule that a law takes effect from the time of its approval⁵⁹ or passage,⁶⁰ as the case may be. It therefore logically follows that in the event a controversy arises concerning the effective date of such a statute, the exact time of its passage may be shown.⁶¹ In

⁵² *Harrington Co. v Chopke*, 108 N.J. Eq. 297, 154 Atl. 849. Also see *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883.

⁵³ *State ex rel Nejdil v Bowman*, 199 Ind. 436, 156 N.E. 394, 157 N.E. 723. Also see Note, 37 Yale L.J. 127 (1927).

⁵⁴ For further treatment of repeals, see Chapters XIV and XXVIII, *infra*.

⁵⁵ *In re Opinion of the Justices (Mass.)* 191 N.E. 33.

⁵⁶ *Seligman v Halloday (La. Ap.)* 154 So. 481.

⁵⁷ *Adam v Wright*, 84 Ga. 720, 11 S.E. 893; *Cole v County Com'rs*, 64 Me. 31; *Hustings v Milwaukee*, 200 Wis. 434, 228 N.W. 502. But note *State v Slave King*, 12 La. Ann. 592. For further treatment of this problem, see § 322, *infra*.

⁵⁸ *Kane v New York etc. Ry. Co.*, 49 Conn. 139. But see *State ex rel City Loan Co. v Moore*, 124 Ohio St. 256, 177 N.E. 910, that the re-enactment operated as a motion to reconsider, thus nullifying the repeal. Also note 45 Harv. L.Rev. 591 (1932) for additional discussion.

⁵⁹ *Gardner v The Collector (U.S.)* 6 Wall. 499; *Louisville v Portsmouth Savings Bank*, 104 U.S. 469; *People v Clark*, 1 Calif. 406; *Grosvenor v Magill*, 37 Ill. 239; *Strauss v Heiso*, 48 Md. 292; *Parkinson v Brandenburg*, 35 Minn. 294; *Welch v Hannibal etc. R. Co.*, 26 Mo. Ap. 358.

⁶⁰ *Ibid*.

⁶¹ *Burgess v Salmon*, 97 U.S. 381; *Long v Phillips*, 27 Ala. 311; *Brainard v Bushnell*, 11 Conn. 17; *Savage v State*, 18 Fla. 970.

the absence of proof, however, of the exact time of its enactment, the statute will be considered effective from the first moment of the day that the legislative process was completed.⁶²

Obviously, the rule allowing the exact date of the enactment of a statute to be shown, is contrary to the maxim that the law does not take notice of the fractions of a day.⁶³ But this maxim has been properly subjected to criticism, and consequently condemned for its attendant harsh operation because of its tendency to force statutes to operate retrospectively,⁶⁴ and because the maxim itself is logically unsound.⁶⁵

After all, a statute can only command from the hour and the minute of the completion of the last step in the legislative process essential to its becoming a law. This being true, it is difficult to see how a statute could be effective as a law before its actual enactment. Undoubtedly, a realization of this situation has sometimes caused the courts to refuse to apply the maxim, particularly where its application would result in the statute having an undesirable effect.⁶⁶

Perhaps no case so ably points out the defects in the maxim and indicates the true rule, or the rule which should be applied, as

⁶² *Leidigh Carriage Co. v Stengel*, 95 Fed. 637, 37 C.C.A. 210; *Greene v E. H. Taylor, Jr., & Sons*, 184 Ky. 739, 212 S.W. 925; *Lloyd v North Carolina R. Co.*, 151 N.C. 536, 66 S.E. 604.

⁶³ *Brown v Buzan*, 24 Ind. 194.

⁶⁴ *In re Richardson*, Fed. Cas. No. 11,777, *Leidigh Carriage Co. v Stengel*, 95 Fed. 637.

⁶⁵ *In re Richardson*, Fed. Cas. No. 11,777.

⁶⁶ "It is true that for many purposes the law knows no divisions of a day, but whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids one, in a legal proceeding, to consider its component hours any more than about a month which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules. *Grosvenor v Magill*, 37 Ill. 239. Also see *Louisville v Portsmouth Savings Bank*, 104 U.S. 469, 26 L.Ed. 775; *Davis v Whidden*, 117 Calif. 618, 49 Pac. 766; *Leavenworth Coal Co. v Barber*, 47 Kan. 29, 27 Pac. 114; *Kennedy v Palmer (Mass.)* 6 Gray 316; *Moree v State*, 130 Miss. 341, 94 So. 229, *In re Dreyfus*, 18 N.Y.S. 767; *Arrowsmith v Hanering*, 39 Ohio St. 573; *Southwark Bank v Common.*, 26 Pa. 446; *Cromelian v Brink*, 29 Pa. 522.

does In re Richardson (Fed. Cas. No. 11,777), involving the repeal of the Bankrupt Act of 1841:

"I am aware, that it is often laid down, that in law there is no fractions of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere fiction, and, therefore, like all other legal fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in the furtherance of the right and justice of the case; and there may be even a priority of an instance of time; or in other words it may have a beginning and an end. (Cases cited.) The common case put to illustrate the doctrine, that there is no fraction in a day, is the case, when a person arrives at majority. Thus, if a man should be born on the first day of February, at 11 o'clock at night, and should live to the 31st day of January, twenty-one years after, and should at one o'clock of the morning of that day make his will, and afterwards die by six o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good. Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy. . . . But, many cases may easily be put, where the real fact is allowed to prevail, and to be conclusive. Thus, for example, if a woman make a deed of her land in the morning, and is afterwards married, or dies on the same day, the deed is good. So, if my ancestor die at five o'clock in the morning, and I enter into his lands at six o'clock, and make a lease at seven o'clock of the same day, the lease is good. So, if the ancestor, and his immediate heir, both die on the same day, and the inheritance would pass to different persons, according to the survivorship of the ancestor, or the heir, then, the actual fact, which survived the other, may be proved, so as to pass the inheritance to the proper party entitled thereto. Nay, the question of survivorship, may often, in the absence of direct proof, be decided by mere presumption, from age, sex, constitution, and other circumstances, where both perish by the same common calamity, as by the foundering of the ship, at sea, in which they are both embarked. In short, the true doctrine, upon this whole subject, is laid down in *Wrangham v Hersey*, 3 Wils. 274, where the court said: "It is said, that there is no fractions in a day; but this is a mere fiction in law (*Fictio juris neminem laedere debet*"); but avail much it may. And this is seen in all matters where the law operates by relation, and by division of an instant, which are fictions in law." And, after putting various other illustrations, the court added: "By fiction of law, the whole time of the assizes, and the whole session of parliament may be, and sometimes are considered as one day; yet

the matter of fact shall overturn the fiction in order to do justice between the parties." See Com. Dig. "Temps." c. 8. In *Combe v Pitt*, 3 Burrows, 1423, 1434, Lord Mansfield approved a similar doctrine, and said: "But, though the law does not in general, allow of the fraction of a day, yet it will in cases, where it is necessary to distinguish. And I do not see, why the every hour may not be so too, where it is necessary, and can be done; for, it is not like a mathematical point, which cannot be divided." So that we see, that there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of substantial justice. Indeed, I know of no case, where the doctrine of relation, which is a mere fiction of law, is allowed to prevail unless it be in furtherance and protection of rights, *pro bono publico*. But it appears to me, that the doctrine assumes a broader importance, under the constitution and laws of the United States.

By the constitution of the United States, "Every bill, which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve it, he shall sign it; but, if not, he shall return it, with his objections, to the house in which it shall have originated," etc. (Article 1, § 7.) Now, it seems to me clear, from this language, that in every case of a bill, which is approved by the president, it takes effect as a law only by such approval, and from the time of such approval. It is the act of approval, which makes it a law; and, until that act is done, it is not a law. The approval cannot look backwards, and, by relation make that a law, at any antecedent period of the same day, which was not so before the approval; for the general rule is, "*Lex prospicit, non respicit*." Branch, Max., p. 99 (Jenk. Cent. text, 284). The law prescribes a rule for the future, not for the past; or, as it is sometimes expressed, "*Lex dat formam futuris, non preteritis negotiis*". And this in a republican government, is a doctrine of vital importance to the security and protection of the citizen. It is fully recognized in the constitution itself, which declares, that no ex post facto law shall be passed. Put the case, that a statute, passed on the third of March, last, which created and punished as public offences certain acts, which were not so before the passage of the statute; and the statute was approved at eleven o'clock at night; and an act was done in the preceding part of the day, which was innocent at the time when it was done; could it be contended, that the party would be punishable therefor by relation or that it was not within the prohibition of the constitution, as an ex post facto law, so far as it operated upon his case? If it should be said, that the law does not recognize any fractions of a day, why may we not deem the law in

force only from the last instant of the day, instead of carrying it back, by relation, to the first instant of the day? If there be any choice, as to the principle of interpretation, one should think that that ought to be adopted, in cases of this sort, which is most favorable to private rights and public justice. Surely the constitution is not to be set aside, or varied in its intendment, by mere legal fictions. On the contrary, it appears to me, that in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide as to the time, when the law is to have its effect, and then to have its effect prospectively, and not retrospectively. It may not, indeed, be easy, in all cases, to ascertain the very *punctum temporis*; but that ought not to deprive the citizen of any rights created by antecedent laws, and vesting rights in them. In cases of doubt, the time should be construed favorably for the citizen. The legislature have it in their power to prescribe the very moment, *in futuro*, after the approval when a law shall have effect; and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect. But, when the time can be accurately and fully ascertained (as in the present case), when a bill was approved, I confess that I am not bold enough to say, that it became, by relation, a law at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the constitution.”

It is therefore evident that there are many cases where fractions of a day will be taken into account,⁶⁷ and even where the initiative and referendum are involved, as is so well suggested in *Louisville v Portsmouth Savings Bank*:⁶⁸

At what precise hour on that day the Constitution was adopted by popular vote cannot be stated. But we know that it could not have occurred before sunset, since the schedule, providing for the submission of the Constitution to the popular vote, expressly required the polls to be kept open for the reception of ballots until that hour. Nor are we able to ascertain, from the record, the exact moment when the township voted in favor of the issue of these bonds. The town meeting to determine whether they should be issued, in lieu of a special tax, was to be held at nine o'clock in the forenoon; it was so held, and only fifty-four votes were cast, of which fifty-two were in favor of the issue. The presumption may, therefore, be

⁶⁷ *U.S. v Norton*, 97 U.S. 164, 24 L.Ed. 907.

⁶⁸ *Louisville v Portsmouth Sav. Bank*, 104 U.S. 469, 26 L.E. 775. Also see Notes in 50 A.L.R.(n.s.) 209, and L.R.A. 1917 B, 25, for cases directly involving the initiative and referendum.

fairly indulged that the township had, in fact, voted for issuing bonds before the close of the general election on the same day at which the people of the state voted on the adoption of the particular sections of the constitution, separately submitted, which relate to municipal subscriptions to railroads and private corporations.

In view of the authorities it cannot be doubted that the courts may, when substantial justice requires it, ascertain the precise hour when a statute took effect by the approval of the executive. But it may be argued that the rule does not apply where the inquiry is as to the time when constitutional provisions became operative by popular vote; that a popular vote, given at an election covering many hours of the same day, should be deemed one indivisible act, effectual, by relation, from the moment the electors entered upon the performance of that act, to-wit, from the opening of the polls. But we are of the opinion that no such distinction can be maintained. In determining when a statute took effect no account is taken of the time it received the sanction of the two branches of the legislative department, which sanction is as essential to the validity of the statute as the approval of the executive. We look to the final act of approval by the executive to find when the statute took effect, and, when necessary, inquire as to the hour of the day when that approval was, in fact, given. So, in ascertaining when a constitutional provision was adopted, we perceive no sound reason why the courts may not, in proper cases, inquire as to the hour when such approval became effectual, to-wit, as to the time, when, by the closing of the polls, the people had adopted such provision. In this case all difficulty is removed by the fact, made certain by the schedule to the Constitution requiring the polls to be kept open until a certain hour of the day of election. That fact should not be disregarded or ignored in ascertaining when the constitutional provision was adopted, especially since it expressly saved the obligations and rights of municipalities which had, before its adoption, under the authority of pre-existing law, voted subscriptions or donations."

Consequently, the court should have no hesitancy in seeking the exact minute a law comes into being where such action will promote the purposes of substantial justice.⁶⁹

Of course, as suggested in *Leidigh Carriage Co. v Stengel* (95 Fed. 637, 641), cases may arise where the exact moment of a statute's effectiveness, is immaterial, and there is no real objection to

⁶⁹ *Louisville v Portsmouth Savings Bank*, 104 U.S. 469, 26 L.Ed. 775. Also note *Leidigh Carriage Co. v Stengel*, 95 Fed. 637.

allowing the statute's effectiveness to relate back to the beginning of the day during which it was enacted:

"The cases in which it has been permitted to show by evidence, and by records of which the court takes judicial notice, exactly the hour and the minute of the day when a bill is passed, are cases where the effect of the ordinary presumption that the act is approved upon the first minute of the day of its approval would have been to make the legislation retroactive, and therefore harsh and unjust. It is doubtful whether in a case like the present, where the date at issue is four months after the passage of the bill, it should be permitted to go into evidence to show the exact minute and hour of the day when the bill was approved. We are inclined to think that in such a case, where there is no retroactive effect possible, the court should hear no evidence upon the point, but should in order to secure certainty, hold the presumption that the act was approved on the first moment of the day of its date to be conclusive."

Nevertheless, where the date of the law's effectiveness bears upon the rights of the parties in litigation, it is difficult to see how certainty should be of more importance than the recognition of the applicability of the rule which permits the exact minute of a statute's effectiveness to be shown. After all, the objections to according any statute retroactive life for a period, even though it be but an hour, will be always applicable, and only where such retroactiveness in no manner affects the rights of the parties, so that the moment of the law's effectiveness is truly immaterial, can the conclusiveness of the presumption be harmless and therefore from the practical standpoint unobjectionable.

Moreover, where the statute does not go into effect until after the expiration of a certain number of days from the performance of some act or some date, it is also necessary to compute time. The general, as well as the sensible, rule is that the day, or the day on which the required act was performed, and from which the time is to be computed, shall be excluded, and the last day of the number constituting the required period shall be included.⁷⁰ This same rule

⁷⁰ *Garner v Johnson*, 22 Ala. 494; *Stebbins v Anthony*, 5 Colo. 348; *Bemis v Leonard*, 118 Mass. 502; *Simmons v Jacobs*, 52 Me. 147; *Hall v Cassity*, 25 Miss. 48; *Hollis v Francois*, 1 Tex. 118; *State v Mounts*, 36 W.Va. 179, 14 S.E. 407, 15 L.R.A. 243 (passage); *O'Connor v Fon du Lac*, 109 Wis. 253, 85 N.W. 327, 53 L.R.A. 831. Also see *Protection Life Ins. Co. v Palmer*, 81 Ill. 88; *Carothers v Wheeler*, 1 Ore. 194; *Walsh v Boyle*, 30 Md. 262; *Page v Weymouth*, 47 Me. 238; *White v Haworth*, 21 Mo. Ap. 439; *Rand v Rand*, 4 N.H. 267; *Menges v Frick*, 73 Pa. St. 137. This applies to a penal statute of limitations. *State v Smith*, 162 Iowa 336, 144 N.W. 32.

applies to the computation of weeks, months, and years.⁷¹ It seems, however, that there is a departure from this general rule in some cases, or jurisdictions, and in counting the time from the performance of an act, the day of the performance is included,⁷² but in computing from the day or day of the date, the day of the date is excluded.⁷³ Any rule which includes the day on which the act is performed is fairly subject to criticism, unless the act is performed at the earliest possible moment of the day; otherwise, the computation starts before the act is performed. In at least one instance, however, both the day upon which the act was performed and the last day of the period to be computed from the act, were excluded. In this case, the court in computing the specified period of ninety days after adjournment before the statute would go into effect, excluded both the day of adjournment and the ninetieth day, thereby requiring ninety full days.⁷⁴ A great deal might be said for this view, and the courts would do well to follow it wherever possible in the computation of time.

Sundays, in the absence of a statute excluding them from the period prescribed, are counted, even though the period ends on Sunday,⁷⁵ except perhaps where the period is less than a week.⁷⁶

⁷¹ *Brown v Buzan*, 24 Ind. 194; *Portland Bank v Maine Bank*, 11 Mass. 204; *Griffin v Forrest*, 49 Mich. 309; *Blake v Crowingshield*, 9 N.H. 304.

⁷² *Arnold v U.S. (U.S.)* 9 Cranch. 104, 3 L.Ed. 671.

⁷³ *Owen v Slatter*, 26 Ala. 551; *Bemis v Leonard*, 118 Mass. 502; *Kimm v Osgood*, 19 Mo. 60. But see *Prince v Whitman*, 8 Calif. 412; *Presley v Williams*, 15 Mass. 193; *Steamboat v Buckler*, 12 Mo. 477, and *O'Connor v Towns*, 1 Tex. 107, where this rule was departed from so as to include the day of the act's performance, and the announcement is made that the rule may be disregarded in order to prevent an estoppel or forfeiture. But, in determining when a statute becomes effective, the first or the last day is excluded but not both. *State ex rel v State Pharmaceutical Ass'n*, 52 La. Ann. 936, 27 So. 565, 149 L.R.A. 218; *State v Mounts*, 36 W.Va. 179, 14 S.E. 407, 15 L.R.A. 243.

⁷⁴ *Halbert v San Saba Springs Land Ass'n*, 89 Tex. 230, 34 S.W. 639 49 L.R.A. 193.

⁷⁵ *Taylor v Palmer*, 31 Calif. 244; *Chicago v Vulcan Iron Works*, 93 Ill. 222; *Haley v Young*, 134 Mass. 364; *Harrison v Sager*, 27 Mich. 476; *National Bank v Williams*, 46 Mo. 17. But see *State ex rel Hunzicker v Pulliam*, 168 Okla. 632, 37 Pac. (2) 417, 96 A.L.R. 1294, where it is excluded if the period ends on Sunday.

⁷⁶ *Cunningham v Mahan*, 112 Mass. 58; *Drake v Andrews*, 2 Mich. 203; *National Bank v Williams*, 46 Mo. 17. But where the period is more than one or two days; see *Cressey v Parks*, 75 Me. 387; *Simonson v Durfee*, 50 Mich. 80.

And the word "week", when computed according to the calendar, means a period of seven consecutive days, beginning on Sunday and ending on Saturday,⁷⁷ but where the word is used simply as a measure of duration of time and without reference to the calendar, it means a period of seven consecutive days without regard to the day of the week on which it begins.⁷⁸ The word "month" when used with reference to the effective date of a statute means a calendar and not a lunar month of twenty-eight days,⁷⁹ unless there is something clearly indicating otherwise.⁸⁰ It is a word of common rather than of technical meaning.⁸¹ Similarly, in the absence of any contrary intention, the word "year" means a period of twelve months or three hundred and sixty-five days.⁸² Such a year begins on the first day of January and ends on the last day of December,⁸³ although the word may be used to mean a period of twelve months from a given date.⁸⁴ Since weeks, months and years consist of days,

⁷⁷ *Leach v Burr*, 188 U.S. 510, 23 S.Ct. 393, 47 L.Ed. 567, *In re Tyson*, 13 Colo. 482, 22 Pac. 810, 6 L.R.A. 472; *Raunn v Leach*, 53 Minn. 84, 54 N.W. 1058; *Russell v Croy*, 164 Mo. 69, 63 S.W. 849; *Midland v Linton*, 60 Neb. 249, 82 N.W. 866.

⁷⁸ *Derby & Co. v City of Modesto*, 104 Calif. 515, 38 Pac. 901; *Bird v Burgsteiner*, 100 Ga. 486, 28 S.E. 219; *Raunn v Leach*, 53 Minn. 84, 54 N.W. 1058; *Evans v Job*, 8 Nev. 322.

⁷⁹ That a lunar month is composed of twenty-eight days, see *Rives v Guthrie*, 46 N.C. 84.

⁸⁰ *Guaranty Trust and Safe Dep. Co. v Green Cove Springs etc., R. Co.*, 139 U.S. 137, 11 S.Ct. 512, 35 L.Ed. 116; *Riddle v Hill's Admr.*, 51 Ala. 224; *Scoville v Anderson*, 131 Calif. 590, 63 Pac. 1013; *Daly v Concordia Fire Ins. Co.*, 16 Colo. Ap. 349; *Holton v Brimrod*, 8 Kan. Ap. 265, 55 Pac. 505; *Baltimore etc., R. Co. v Pumphrey*, 74 Md. 86, 21 Atl. 559; *Mitchell v Woodson*, 37 Miss. 567; *Hosley v Black*, 28 N.Y. 438; *Muse v London Assur. Corp.* 108 N.C. 240, 13 S.E. 94; *McGinn v State*, 46 Neb. 427, 65 N.W. 46, and the note in 30 L.R.A. 450; *Kimball v Lamson*, 2 Vt. 138. Under the common law the word meant a lunar month. *Rives v Guthrie*, 46 N.C. 84. Also see *State v Jacobs*, 2 Dela. 548.

⁸¹ *Gross v Fowler*, 21 Calif. 392.

⁸² *Aultman & Taylor Co. v Syne*, 163 N.Y. 54, 57 N.E. 168; *Muse v London Assur. Corp.*, 108 N.C. 240, 13 S.E. 94. Within one year means longer than one year. *Scharff v Car Co. (Mo.)* 264 S.W. 56.

⁸³ *U.S. v Dickson (U.S.)* 15 Pet. 141, 10 L.Ed. 689; *David v Hardin County*, 104 Iowa 204, 73 N.W. 576; *Garfield Township v Dodsworth Book Co.*, 9 Kan. Ap. 752, 58 Pac. 565.

⁸⁴ *U.S. v Dickson (U.S.)* 15 Pet. 141, 10 L.Ed. 689 (political year); *Glasgow v Rowse*, 43 Mo. 479 (fiscal year).

it is, of course, important to know what the term "day" means. It is a period of time consisting of twenty-four hours, and when such a period begins will depend upon the intention of the legislature,⁸⁵ although in the absence of a contrary indication, it will generally be considered as starting at midnight and as ending at the succeeding midnight.⁸⁶

§ 114. Retrospective Operation, Generally.—Statutes may not only be prospective but retroactive in operation, but retroactive effect is looked upon with disfavor and in many instances may even invalidate the law.⁸⁷ Since this general subject is discussed elsewhere in considerable detail, it will not be discussed further at this point.⁸⁸ Nevertheless, there is an obvious difference between the time a law becomes effective and the scope of its operation, although the two may often coincide.

⁸⁵ *Zimmerman v Cowan*, 21 Calif. 392.

⁸⁶ *Rose v State*, 107 Ga. 697, 33 S.E. 439; *Benson v Adams*, 69 Ind. 353; *State ex rel Baxter v Brown*, 22 Minn. 482; *Kane v Common.*, 89 Pa. 522.

⁸⁷ See § 277, *infra*.

⁸⁸ See Chapter XXV, § 277, *et seq.*, *infra*.

CHAPTER XII

AMENDMENTS

- § 115. Amendment Defined.
- § 116. The Power to Amend.
- § 117. Statutes Which May Be Amended.
- § 118. Title.
- § 119. Identification of Amended Acts.
- § 120. Description of Amended Statute.
- § 121. Setting Forth the Amendatory Statute, In General.
- § 122. Sufficiency of Statement of Amendatory Statute.
- § 123. Statutes Required to Be Set Forth.
- § 124. Effect of Invalid Amendments, Generally.

§ 115. **Amendment Defined.**—There are many different definitions of the term “amendment” as it applies to legislation. Generally, it may be defined as “an alteration or change of something proposed in a bill or established as law”.¹ We are not, however, here concerned with the amendment of proposed bills,² but with the amendment of existing laws. Thus limited, a definition, as suitable as any, defines an amendment as a change in some of the existing provisions of a statute.³ Or, stated in more detail, a law is amended when it is in whole or in part permitted to remain and something is added to, or taken from it, or it is in some way changed or altered in order to make it more complete, or perfect, or effective.⁴ It should be noticed, however, that an amendment is not the same as a repeal, although it may operate as a repeal to a certain degree.⁵

¹ *State v Cooney*, 70 Mont. 355, 225 Pac. 1007; *Warren v Crosby*, 24 Ore. 558, 24 Pac. 558. See also *State v Hubbard*, 148 Ala. 391, 41 So. 903; *State ex rel Nagle v Leader Co.* (Mont.) 37 Pac. (2) 561. For construction of amendments, see *infra*, Chapter XXVII, § 302, et seq.

² See *supra*, §§ 37 and 41, for treatment of the amendment of bills during course of enactment.

³ *Sheridan v Salem*, 14 Ore. 328, 12 Pac. 925.

⁴ *U.S. v Lapp*, 244 Fed. 377, 157 C.C.A. 3; *People v Perkins*, 56 Colo. 17, 137 Pac. 55.

⁵ *State v Hubbard*, 148 Ala. 391, 41 So. 903; *Gregory v Cockrell*, 179 Ark. 719, 18 S.W. (2) 362. However, where the replacement theory of amendments prevails, the original act is blotted out and is superseded by the amendatory act, leaving it alone in effect. *Louisville etc., R. Co. v East St. Louis*, 134 Ill. 656, 25 N.E. 962. But later cases in Illinois do not follow this rule. *People v Boykin*, 298 Ill. 11, 131 N.E. 133.

A repeal is the abrogation or destruction of a law by a legislative act.⁶ Hence, we may see that it is the effect of the legislative act which determines its character.⁷

§ 116. **The Power to Amend.**—Of course, the power to amend existing legislation is vested in the legislature,⁸ and not in the judiciary,⁹ since it represents a part of the legislative power.¹⁰ Yet one legislature can not limit the amending power of subsequent legislatures.¹¹ Only by constitutional provision can this power be limited or abrogated.¹² Consequently, in the absence of such an inhibition, the legislature can amend the enactments of its predecessors¹³ as well as those passed by it at the same session at which the amendment is made.¹⁴ And if statutes can be enacted by joint resolutions, amendments may be passed in the same manner; at least, where the amendment is of a temporary nature.¹⁵

§ 117. **Statutes Which May Be Amended.**—Technically, an amended statute is not a new and independent statute.¹⁶ As we have already seen,¹⁷ a part of the original act remains. Logically, therefore, a statute which has been repealed in its entirety, is not subject to

⁶ See § 133, *infra*.

⁷ *State v Chadbourne*, 74 Me. 506.

⁸ *People v Illinois Central R. Co.*, 314 Ill. 339, 145 N.E. 719; *Manufacturers' Finance Corp. v Bramlett*, 157 S.C. 419, 154 S.E. 410. See also *Birmingham Drainage Dist. v Chicago etc., R. Co.*, 274 Mo. 140, 202 S.W. 404; *Flores v State*, 109 Tex. Cr. 261, 4 S.W. (2) 43.

⁹ *Edrington v Payne*, 225 Ky. 86, 7 S. W. (2) 827; *Manufacturers' Finance Cor. v Bramlett*, 157 S.C. 419, 154 S.E. 410.

¹⁰ See § 11, *supra*.

¹¹ *Hammons v Watkins*, 33 Ariz. 76, 262 Pac. 616; *State v Hicks*, 48 Ark. 515, 3 S.W. 524; *Mix v Ill. Central R. Co.*, 116 Ill. 502, 6 N.E. 42; *Solberg v Davenport*, 211 Iowa 612, 232 N.W. 477; *State v Wirt County Ct.*, 37 W.Va. 808, 17 S.E. 379.

¹² *Birmingham Drainage Dist. v Chicago etc., R. Co.*, 274 Mo. 140, 202 S.W. 404; *Van Steenwyck v Sackett*, 17 Wis. 645.

¹³ *Higgins v Hubbs*, 31 Ariz. 252, 252 Pac. 515; *State v Davis*, 113 Kan. 4, 213 Pac. 171; *State Highway Com. v Coleman*, 236 Ky. 444, 33 S.W. (2) 318; *State v Loomis*, 75 Mont. 88, 242 Pac. 344; *Alexander v McDowell County*, 70 N.D. 208; *Flores v State*, 109 Tex. Cr. 261, 4 S.W. (2) 43.

¹⁴ *Mobile etc., R. Co. v State*, 29 Ala. 573; *State v Bressie*, 304 Mo. 71, 262 S.W. 1015, 266 S.W. 766; *Attorney-Gen. v Brown*, 1 Wis. 513.

¹⁵ *Oklahoma News Co. v Ryan*, 101 Okla. 151, 224 Pac. 969. But see *State v Columbia Water Power Co.*, 90 S.C. 568, 74 S.E. 26.

¹⁶ See *Walsh v State*, 142 Ind. 357, 41 N.E. 65, 33 L.R.A. 392.

¹⁷ See § 115, *supra*.

amendment,¹⁸ but the weight of authority is to the contrary,¹⁹ and accordingly allows the new enactment to stand, if it is a law independent and complete in itself.²⁰ In other words, it must meet the requirements of an original statute.²¹ And this is, undoubtedly, the better view, from a practical standpoint. But where the repeal is partial, there is no prohibition against an amendment of the statute,²² even under the view which prohibits an amendment where the repeal is in *in toto*.²³

There is likewise a conflict in the authorities whether a statute which is unconstitutional in its entirety, can be amended. Some

¹⁸ *Fletcher v Prather*, 102 Cal. 413, 36 Pac. 658; *Lampkin v Pike*, 115 Ga. 827, 42 S.E. 213; *Louisville etc., R. Co. v East St. Louis*, 134 Ill. 656, 25 N.E. 962; *State v Wahoo*, 62 Neb. 40, 86 N. W. 923; *State v O'Brien*, 95 Ohio St. 166; *State v Dixie Finance Co.*, 152 Tenn. 306, 278 S.W. 59. This view is based on the fact that a repeal destroys the existence of a statute, so that nothing remains to be amended. *Metsker v Whitsell*, 181 Ind. 704, 103 N.E. 1078; *Fletcher v Prather*, *supra*; *State v Long*, 132 La. 170, 61 So. 154; *State v Silver Bow Ref. Co.*, 78 Mont. 1, 252 Pac. 301. And the same rule applies where the repeal is by implication. *Louisville etc., R. Co. v East St. Louis*, *supra*; *State v Benton*, 33 Neb. 823, 51 N.W. 140. Similarly, where an amendment is regarded as blotting out and superseding the amended act, it is the amendatory rather than the original act that must be amended, after the first amendment, in order to be valid. Thus, in the following cases, the court held invalid amendatory statutes, which failed to amend the last amendatory act. *Draper v Falley*, 33 Ind. 465; *Metsker v Whitsell*, 181 Ind. 126, 103 N.E. 1078.

¹⁹ *Doe v Matthews*, 192 Ala. 181, 68 So. 182; *Anderson v Douglas County*, 67 Colo. 403, 186 Pac. 284; *Brewer v City of Pittsburg*, 91 Kan. 910, 139 Pac. 418; *Attorney-Gen. v Stryker*, 141 Mich. 437, 104 N.W. 737; *State v Blake*, 241 Mo. 100, 144 S.W. 1094; *Worthington v Dist. Ct.*, 37 Nev. 212, 142 Pac. 230; *Abrams v Smith*, 98 N.J.L. 319, 119 Atl. 792; *People v Jefferson County Canvassers*, 143 N.Y. 84, 37 N.E. 649; *State v Brewster*, 30 Ohio St. 653; *Common. v Chesapeake, etc., R. Co.*, 118 Va. 261, 87 S.E. 622. And see *State v Walters*, 135 La. 1070, 66 So. 364.

²⁰ See cases under note 19, *supra*. For a good discussion regarding the reason for this view, see *Common. v Chesapeake etc., R. Co.*, 118 Va. 261, 87 S.E. 622.

²¹ *Anderson v Douglas County*, 67 Colo. 403, 186 Pac. 284; *Reynolds v Topeka Board of Education*, 66 Kan. 672, 72 Pac. 274; *People v Jefferson County Canvassers*, 143 N.Y. 84, 37 N.E. 649.

²² *State v Nelson*, 135 La. 678, 65 So. 893; *Common. v Chesapeake, etc., R. Co.* 118 Va. 261, 87 S.E. 622.

²³ *Mitchell v State*, 19 Ind. 381.

authorities hold that such a statute cannot be amended,²⁴ for the reason that if the original enactment is completely unconstitutional, there is nothing to amend,²⁵ since an unconstitutional act, being void, has no existence as a law. Other authorities, however, adhere to the view that a statute unconstitutional in its entirety, may be amended, provided the amendment qualifies as a complete and independent statute in and of itself.²⁶ And in at least one state, the courts do not consistently adhere to either of these two views, but allow an amendment, except in those cases where the statute is completely unconstitutional by virtue of a lack of power in the legislature to enact it.²⁷ But where a statute is unconstitutional in part only, it may be laid down, as a general rule, undoubtedly in all jurisdictions, that the statute may be amended by obliterating the invalid provisions or by correcting those which violate the constitution.²⁸

Moreover, a statute cannot be amended so long as its opera-

²⁴ *Mid-Continent Petroleum Corp. v Alexander*, 35 Fed. (2) 43; *Hill v American Book Co.*, 171 Ark. 427, 285 S.W. 20; *Williams v Dormany*, 99 Fla. 496, 126 So. 117; *Keane v Remy (Ind.)* 168 N.E. 10; *Lynch v Murphy*, 119 Mo. 163, 24 S.W. 774; *Plattsmouth v Murphy*, 74 Neb. 749, 105 N.W. 293; *Paris Mountain Water Co v City of Greenville*, 110 S.C. 36, 96 S.E. 545. This view finds considerable support in the status of the statute after it has been declared unconstitutional by the courts. See *Plattsmouth v Murphy*, *supra*.

²⁵ *Ibid*.

²⁶ *Los Angeles County v Jones (Calif.)* 59 Pac. (2) 489; *Hall v Boston Street Commrs.*, 177 Mass. 434, 59 N.E. 68; *People v DeBlaay*, 137 Mich. 402, 100 N.W. 598; *State v Silver Bow Ref. Co.*, 78 Mont. 1, 252 Pac. 301; *Allison v Corker*, 67 N.J.L. 596, 52 Atl. 362, 60 L.R.A. 564; *State v Cincinnati*, 52 Ohio St. 419, 40 N.E. 508, 27 L.R.A. 737; *English Mortgage Co. v Hardy*, 93 Tex. 289, 55 S.W. 169; *Common. v Chesapeake, etc., R. Co.*, 118 Va. 261, 87 S.E. 622. And note the additional reasoning in *Allison v Corker*, *supra*, that the act is not void but merely inoperative until the defect is removed by amendment.

²⁷ *Bradford City v Pennsylvania Tel. Co.*, 26 Pa. Co. 321. Also note *McLaughlin v Summit Hill Borough*, 224 Pa. 425, 73 Atl. 975.

²⁸ *State v Corbett*, 61 Ark. 226, 32 S.W. 686; *Jacksonville etc., R. Co. v Adams*, 33 Fla. 608, 15 So. 257, 24 L.R.A. 272; *Smith v State Board of Medical Examiners*, 172 Ga. 106, 157 S.E. 268; *Ferry v Campbell*, 110 Iowa 290, 81 N.W. 604, 50 L.R.A. 92; *State v McCall*, 162 La. 471, 110 So. 723; *Lawton Spinning Co. v Common.*, 232 Mass. 28, 121 N.E. 518; *Lynch v Murphy*, 119 Mo. 163, 24 S.W. 774; *State v Silver Bow Ref. Co.*, 78 Mont. 1, 252 Pac. 301; *Allison v Corker*, 67 N.J. Law 596, 52 Atl. 362, 60 L.R.A. 564; *Paris Mountain Co. v Greenville*, 110 S.C. 36, 96 S.E. 545; *Clay v Buchanan*, 162 Tenn. 204, 36 S.W. (2) 91. See also *Walsh v State*, 142 Ind. 357, 41 N.E. 65, 33 L.R.A. 392, and note, 60 L.R.A. 564.

tion is suspended by a referendum.²⁹ And the constitution may expressly exempt certain laws from the amending power of the legislature.³⁰

§ 118. **Title.**—Since this matter has been discussed elsewhere,³¹ it will not be treated further at this point. Suffice it to say that the rules which apply to statutes generally are equally applicable to amendatory statutes.³²

§ 119. **Identification of Amended Acts.**—Since amendatory acts, strictly speaking, are not new laws but continuations of the old,³³ the old act must be adequately identified. In fact, constitutional provisions often require that the amendatory act identify the act it amends.³⁴ Provisions of this type have been regarded as mandatory.³⁵

But the means of identification may vary.³⁶ Usually, a reference to the amended statute is sufficient if such reference makes the identification reasonably certain.³⁷ A recitation of the title of

²⁹ In re Opinion of Justices, 132 Me. 512, 174 Atl. 853.

³⁰ Johnson v Simpson (Ark.) 51 S.W. (2) 233 (local laws). And of course a statute in the nature of a contract, cannot be amended. Charles River Bridge v Warren Bridge, 11 Pet. 420, 9 L.Ed. 773.

³¹ See supra, Chapt. X, § 95, et seq.

³² See Chapt. X, supra. Also note The Form of Amendatory Statutes (1929) 43 Harvard L. Rev. 482, and Drafting Amendatory Statutes (1930) 43 Harv. L. Rev. 1143.

³³ See supra, §§ 115 and 117.

³⁴ Johnson v Pinkley, 141 Ark. 612, 217 S.W. 805; Mouton v City of Lafayette, 130 La. 1064, 58 So. 883; Murphy v Eney, 77 Md. 80, 25 Atl. 993; People v Pritchard, 21 Mich. 236; State v Cresswell, 117 Miss. 795, 78 So. 770; State v Mitchell, 17 Mont. 67, 42 Pac. 100; Aurora Board of Education v Moses, 51 Neb. 288, 70 N.W. 946; State v Hallock, 19 Nev. 384, 12 Pac. 832, In re Pittsburgh's Pet., 138 Pa. 401, 21 Atl. 757.

³⁵ See Aurora Board of Education v Moses, 51 Neb. 288, 70 N.W. 946.

³⁶ See Note 43 Harv. L. Rev. (1930) 1143.

³⁷ Harper v State, 109 Ala. 28, 19 So. 857; Johnson v Pinkley, 141 Ark. 612, 217 S.W. 805; Saunders v Pensacola, 24 Fla. 226, 4 So. 801; People v Boykin, 298 Ill. 11, 131 N.E. 133; State v Thomas, 74 Kan. 360, 86 Pac. 499; Hickman v Kimbley, 161 Ky. 652, 171 S.W. 176; Pue v Hetzel, 16 Md. 539; Pioneer Fuel Co. v Molloy, 131 Mich. 465, 91 N.W. 750; Winona v Whipple, 24 Minn. 61; Mehrens v Greenleaf, 119 Neb. 82, 227 N.W. 325; Worthington v Second Judicial Dist. Ct., 37 Nev. 212, 142 Pac. 230; McDonald v Hudson County, 98 N.J.L. 386, 121 Atl. 297; People v Clute, 50 N.Y. 451; State v Banfield, 43 Ore. 287, 72 Pac. 1093; Shipley v Floydada, Ind. School Dist. (Tex. Civ. Ap.) 250 S.W. 159; State v Cross, 44 W.Va. 315, 29 S.E. 527; Madison etc., Plank Road Co. v Reynolds, 3 Wis. 287; Hollibaugh v Hehn, 13 Wyo. 269, 79 Pac. 1044.

the old act or statute is also generally considered as meeting this test,³⁸ although other methods are regarded as being equally sufficient. Thus, identification may be made by referring to the amended statute by its number and section in the session laws of a particular year,³⁹ or by reference to the proper chapter and section,⁴⁰ or some other similar citation of the amended statute⁴¹ in an official compilation of the statutes.⁴² The date of the approval of the amended act, however, does not need to be set forth,⁴³ although it may be a source of identification, if used.⁴⁴ And mere clerical errors or

³⁸ *Stone v State*, 137 Ala. 1, 34 So. 629; *School Dist. v School Dist.*, 73 Ill. 249; *Hickman v Kimbly*, 161 Ky. 652, 171 S.W. 176; *Arnoult v New Orleans*, 11 La. Ann. 54; *State v Stewart*, 52 Neb. 243, 71 S.W. 998, *In re McKeown*, 237 Pa. 626, 85 Atl. 1085; *Hood v City of Wheeling*, 85 W.Va. 578, 102 S.E. 259. But the Indiana decisions require that the title of the amended act be set out in full in the title of the amendatory act. *Thorn v Silver*, 174 Ind. 504, 89 N.E. 943, 92 N.E. 161; *Hendershot v State*, 162 Ind. 69, 69 N.E. 679; *Boring v State*, 141 Ind. 640, 41 N.E. 270; also see *The Form of Amendatory Statutes*, (1929) 43 Harv. L. Rev. 482.

³⁹ *McCoy v Jefferson County*, 232 Ala. 651, 169 So. 304; *State v Thomas*, 74 Kan. 360, 86 Pac. 499; *State v Nelson*, 135 La. 678, 65 So. 893; *Merritt v Whitlock*, 200 Pa. 50, 49 Atl. 786; *State v Burnside*, 32 S.D. 291, 142 N.W. 1128.

⁴⁰ *Ross v Aguirre*, 191 U.S. 60, 48 L.Ed. 94, 24 S.Ct. 22; *Montgomery v State*, 107 Ala. 372, 18 So. 157; *Beach v Von Detten*, 139 Calif. 462, 73 Pac. 187; *Wheeler v State*, 23 Ga. 9, *Ex parte Paducah*, 125 Ky. 510, 101 S.W. 898; *State v Brown*, 41 La. Ann. 771, 6 So. 638; *Garrison v Hill*, 81 Md. 551, 32 Atl. 191; *People v Judge*, Grand Rapids Super. Ct., 39 Mich. 195; *State v Marion County Court*, 128 Mo. 427, 30 S.W. 103; *State v Stewart*, 52 Neb. 243, 71 N.W. 998, *Ex parte Howe*, 26 Ore. 181, 37 Pac. 536; *Cummings v Atty.-Gen.*, 13 Pa. Dist. 521; *Womack v Garner (Tex.)* 31 S.W. 358; *Edler v Edwards*, 34 Utah 13, 95 Pac. 367; *Common. v Brown*, 91 Va. 762, 21 S.E. 357, 28 L.R.A. 110; *State v Mines*, 38 W.Va. 125, 18 S.E. 470.

⁴¹ Chapter, title, and section: *The Borrowdale*, 39 Fed. 376; *State v Long*, 21 Mont. 26, 52 Pac. 645; *State v Stewart*, 52 Neb. 243, 71 N.W. 998; *State v Phenline*, 16 Ore. 107, 17 Pac. 572. Title and chapter: *State v Berka*, 20 Neb. 375, 30 N.W. 267.

⁴² A reference to an unofficial compilation of the statutes, is not a sufficient identification. *Lipscomb v Kaloroukas (Fla.)* 133 So. 107. But, if the compilation is of a reliable nature or one accepted by the public and relied upon, there is no well founded reason why a reference should not be as sufficient as if made to an official compilation.

⁴³ *Harper v State*, 109 Ala. 28, 19 So. 857; *Citizens St. R. Co. v Haugh*, 142 Ind. 254, 41 N.E. 533; *Willis v Mahon*, 48 Minn. 140, 50 N.W. 1110; *State v Mines*, 38 W.Va. 125, 18 S.E. 470.

⁴⁴ *Stone v State*, 137 Ala. 1, 34 So. 629; *Shoemaker v Smith*, 37 Ind. 122; *In re McKeown*, 237 Pa. 626, 85 Atl. 1085.

omissions in stating the means of identification will not invalidate the amendment, if the court can ascertain the intention of the legislature from the entire statute⁴⁵ with reasonable certainty.⁴⁶

The matters recited for identification purposes may be placed either in the title or in the body of the new statute.⁴⁷ The court will, however, resort first to the body of the new statute in its effort to find the means of identification,⁴⁸ but failing there, it will resort to the title.⁴⁹

And a statute which makes a second amendment of the original act does not need to make any reference to the first amending act.⁵⁰

⁴⁵ *Dakota County School Dist. v Chapman*, 152 Fed. 887, cert. den., 205 U.S. 545, 51 L.Ed. 923, 27 S.Ct. 792; *Harper v State*, 109 Ala. 28, 19 So. 857; *Hughes v Kelly*, 95 Ark. 327, 129 S.W. 784; *Saunders v Pensacola*, 24 Fla. 226, 4 So. 801; *Alberson v Hamilton*, 82 Ga. 30, 8 S.E. 869; *People v Penman*, 271 Ill. 82, 110 N.E. 894; *State v Bailey*, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435; *Baker v Agricultural Land Co.*, 62 Kan. 79, 61 Pac. 412; *Lowell v Washington County R. Co.*, 90 Me. 80, 37 Atl. 869; *Pioneer Fuel Co. v Molloy*, 131 Mich. 465, 91 N.W. 750; *Winona v Whipple*, 24 Minn. 61; *State v Mitchell*, 17 Mont. 67, 42 Pac. 100; *State v Babcock*, 23 Neb. 128, 36 N.W. 348; *Worthington v Second Judicial Dist. Ct.*, 37 Nev. 212, 142 Pac. 230; *McDonald v Hudson County*, 98 N.J.L. 386, 121 Atl. 297; *People v Clute*, 50 N.Y. 451; *State v Wollard*, 119 N.C. 779, 25 S.E. 719; *Murphy v Salem*, 49 Ore. 54, 87 Pac. 532; *English Mort. Co. v Hardy*, 93 Tex. 289, 55 S.W. 169; *State v Cross*, 44 W.Va. 315, 29 S.E. 527; *Penberthy v Lee*, 51 Wis. 261, 8 N.W. 116; *Hollibaugh v Hehn*, 13 Wyo. 269, 79 Pac. 1044. Incorrect statement of the section number, *Hughes v Kelly*, 95 Ark. 327, 129 S.W. 784; *People v Van Bever*, 248 Ill. 136, 93 N.E. 725; *Hollibaugh v Hehn*, 13 Wyo. 269, 79 Pac. 1044, of act or chapter numbers; *People v Penman*, 271 Ill. 82, 110 N.E. 894; *Lowell v Washington County R. Co.*, 90 Me. 80, 37 Atl. 869; *Pioneer Fuel Co. v Molloy*, 131 Mich. 465, 91 N.W. 750; *People v Lord*, 41 N.Y.S. 343, have been held insufficient to destroy the validity of the amendment.

⁴⁶ *Harper v State*, 109 Ala. 28, 19 So. 857; *People v Haire*, 321 Ill. 153, 83 N.E. 133; *Citizens St. R. Co. v Haugh*, 142 Ind. 254, 41 N.E. 533; *Common. v Casteel*, 4 Ky. L. 623; *State v Woolard*, 119 N.C. 779, 25 S.E. 719; *Penberthy v Lee*, 51 Wis. 261, 8 N.W. 116.

⁴⁷ *Johnson v Pinkley*, 141 Ark. 612, 217 S.W. 805; *School Dist. No. 5 v School Dist. No. 10*, 73 Ill. 249; *Worthington v Second Judicial Dist. Court*, 37 Nev. 212, 142 Pac. 230; *People v Lord*, 41 N.Y.S. 343; *State v Robinson*, 32 Ore. 43, 48 Pac. 357; *Shipley v Floydada (Tex.)* 250 S.W. 159; *Penberthy v Lee*, 51 Wis. 261, 8 N.W. 116.

⁴⁸ See *Johnson v Pinkley*, 141 Ark. 612, 217 S.W. 805.

⁴⁹ *State v Robinson*, 32 Ore. 43, 48 Pac. 357; *Shipley v Floydada (Tex.)* 250 S.W. 159.

⁵⁰ *Gamon Meter Co. v Sims*, 114 N.J.L. 590, 178 Atl. 92.

§ 120. **Description of Amended Statute.**—In at least one state, the constitution goes considerably beyond the general requirements with reference to the identification of the old statute, and provides that the new act or statute shall contain a description of the statute which is to be amended.⁵¹ A reasonable description of the old statute, however, suffices.⁵² And the description is reasonable if it identifies the amended statute beyond a reasonable doubt.⁵³ Consequently, the description of the changes in the old law must be distinct in order to be sufficient.⁵⁴ Moreover, these constitutional requirements are also mandatory.⁵⁵

In another state, a somewhat similar constitutional provision exists, and requires that the amendatory act recite in its caption or elsewhere, the title or substance of the amended law.⁵⁶ This provision is also mandatory.⁵⁷ A recitation, however, of the subject fulfills the requirement that the substance be stated.⁵⁸ And a reference to the section number of the amended act, although not prescribed by the constitution, does not violate the constitutional requirement that the amendatory act shall recite the title of the law which is to be amended.⁵⁹

§ 121. **Setting Forth the Amendatory Statute—In General.**—Some states prohibit by means of constitutional provisions the amendment of a statute simply by reference to title alone and require the new statute to be set forth and published in its en-

⁵¹ See Ga. Const., Art. 7, § 3. Also note *Atlantia v Pickens*, 176 Ga. 833, 169 S.E. 99.

⁵² *McCall v Freeman*, 163 Ga. 924, 137 S.E. 397; *Cunningham v State*, 128 Ga. 55, 57 S.E. 90.

⁵³ *Georgia Southern etc., R. Co. v George*, 92 Ga. 760, 19 S.E. 813.

⁵⁴ See *English v Smith*, 162 Ga. 195, 133 S.E. 847.

⁵⁵ *English v Smith*, 162 Ga. 195, 133 S.E. 847. But not, if the act does not purport to amend any law. *Durham v State*, 166 Ga. 561, 144 S.E. 109.

⁵⁶ See Tenn. Const. Art. 2, § 17. Also note *McMahan v Felts*, 159 Tenn. 435, 19 S.W. (2) 249.

⁵⁷ *McMahan v Felts*, 159 Tenn. 435, 19 S.W. (2) 249; *Heiskell v Knoxville*, 136 Tenn. 376, 189 S.W. 857.

⁵⁸ *McMahan v Felts*, 159 Tenn. 435, 19 S.W. (2) 249; *State v Runnels*, 92 Tenn. 320, 21 S.W. 665.

⁵⁹ *Texas Co. v Fort (Tenn.)* 80 S.W. (2) 658. But a mere reference to number, section and year of the act amended, is insufficient. *Mattei v Clark Hdw. Co.*, 155 Tenn. 184, 290 S.W. 977.

tirety.⁶⁰ These provisions are also regarded as mandatory⁶¹ and consequently must be complied with, at least, substantially.⁶² Nevertheless, a constitutional inhibition against amendment of a statute by reference to its title only has no application to amendments by implication.⁶³

However, in the absence of such constitutional provisions, amendments may be made by inserting certain words, sentences, or provisions, and by striking out certain words, sentences, or provisions, or by both, by reference to title alone.⁶⁴ This method naturally resulted in considerable confusion and led to the enactment of deceptive laws,⁶⁵ since it was extremely difficult for the members of the legislature, without having the text before them, to understand what was intended.⁶⁶ In order to remedy this situation and prevent "blind" amendments, and the consequent deceiving of the legis-

⁶⁰ Indiana Const. (1851) Art. 4, § 21, is a typical provision. In this state, as a result of the above provision, it is necessary to set forth the last amendatory act rather than the original. The Form of Amendatory Legislation (1929), 43 Harv. L. Rev. 482.

⁶¹ Tuskaloosa Bridge Co. v Olmstead, 41 Ala. 9; Bush v Indianapolis, 120 Ind. 476, 22 N.E. 422; Sedgwich County v Bailey, 13 Kan. 600; Hazelrigg v Hazelrigg, 169 Ky. 345, 183 S.W. 933; State v Trenton, 53 N.J.L. 566, 22 Atl. 731; State v Horner (Okla. Cr.) 290 Pac. 197; State v Beddo, 22 Utah 432, 63 Pac. 96.

⁶² Bates v State, 118 Ala. 103, 24 So. 448; People v Friederich, 67 Colo. 69, 185 Pac. 657; Nelson v Hoffman, 314 Ill. 616, 145 N.E. 688; Hendershot v State, 162 Ind. 69, 69 N.E. 679; Hicks v Davis, 97 Kan. 312, 97 Kan. 662, 154 Pac. 1030, 156 Pac. 774; Attorney-Gen. v Loomis, 141 Mich. 547, 105 N.W. 4; State v Chambers, 70 Mo. 625; State v Majors, 85 Neb. 375, 123 N.W. 429; Gaston v Thompson, 89 Ore. 412, 174 Pac. 717; Common. v Meyers, 290 Pa. 573, 139 Atl. 374; Henderson v Galveston, 102 Tex. 163, 114 S.W. 108; Beale v Pankey, 107 Va. 215, 57 S.E. 661.

⁶³ People v Chicago, 349 Ill. 304, 182 N.E. 419; State ex rel Berthat v Gallatin County H.S. Dist. (Mont.) 59 Pac. (2) 264; Schott v Continental Ins. Underwriters, 326 Mo. 92, 31 S.W. (2) 7; State v Mirabel, 33 N.M. 353, 273 Pac. 928, 62 A.L.R. 296.

⁶⁴ By striking: Southern Pac. Co. v Bartine, 170 Fed. 725; Fletcher v Prather, 102 Calif. 413, 36 Pac. 658; Shelby v Bottineau, 56 Mont. 363, 185 Pac. 162; Bush v Western Union Tel. Co., 93 S.C. 176, 76 S.E. 197; Mobley v Dent, 10 S.C. 471. By adding: U.S. v Lapp, 244 Fed. 377; State v Hubbard, 148 Ala. 391, 41 So. 903; Fletcher v Prather, 102 Calif. 413, 36 Pac. 658; Settlers Irr. Dist. v Settlers Canal Co. 14 Idaho 504, 94 Pac. 829.

⁶⁵ People v Mahaney, 13 Mich. 481; State v Beddo, 22 Utah 432, 63 Pac. 96.

⁶⁶ Southern Pac. Co. v Bartine, 170 Fed. 725; State v Duval County, 23 Fla. 483, 3 So. 193.

lature and the public, the constitutional provisions above discussed were adopted.⁶⁷ Their value is obvious.

§ 122. Sufficiency of Statement of Amendatory Statute.—The constitutional requirement that the new statute be set forth and published at length,⁶⁸ does not, however, require a complete recital of the old statute but only a complete statement of the terms of the new one,⁶⁹ although a recital of the old statute will not invalidate the amended one.⁷⁰ Every beneficial result that is derived from the printing of an amended section or amended statute in full, may be obtained without printing in verbatim the old section or statute.⁷¹ Yet in printing the new or amendatory statute, certain requirements must be met in order for the statute to be properly set forth. These requirements depend to a large extent upon the nature and scope of the amendment. Thus,*the new act must be set forth in its entirety,

⁶⁷ *People v Friederich*, 67 Colo. 69, 185 Pac. 657; *State v Duval County*, 23 Fla. 483, 3 So. 193; *Atchinson, etc., R. Co. v Topeka Board of Educ.*, 123 Kan. 378, 255 Pac. 60; *Lynn v Bullock*, 189 Ky. 604, 225 S.W. 733; *Hart v Backstrom*, 148 Miss. 13, 113 So. 898; *State v Chambers*, 70 Mo. 625. Also see *Notes* (1930) 43 Harv. L.Rev. 482, 483 (1930), 43 Harv. L.Rev. 1143.

⁶⁸ See *supra*, § 121.

⁶⁹ *Erickson v Hodges*, 179 Fed. 177, 102 C.C.A. 443; *State v Patterson*, 146 Ala. 128, 42 So. 19; *In re Miller*, 29 Ariz. 582, 244 Pac. 376; *Fenolio v Sebastain Bridge Dist.*, 133 Ark. 380, 200 S.W. 501; *Sanchez v Fordyce*, 141 Calif. 427, 75 Pac. 56; *State v Duval County*, 23 Fla. 483, 3 So. 193; *Gilbert v Georgia R. Co.*, 105 Ga. 486, 30 S.E. 888; *People v Chicago, etc., R. Co.*, 306 Ill. 529, 138 N.E. 135; *Brewer v Pittsburgh*, 91 Kan. 910, 139 Pac. 418; *Bryan v Voss*, 143 Ky. 422, 136 S.W. 884; *People v Stiner*, 248 Mich. 272, 226 N.W. 899; *Ellis v Parsell*, 100 Mich. 170, 58 N.W. 839; *Heidelberg v Batson*, 119 Miss. 510, 81 So. 225; *State v Herring*, 208 Mo. 708, 106 S.W. 984; *Burge v Wabash R. Co.*, 244 Mo. 76, 148 S.W. 925; *People v McCallum*, 1 Neb. 182; *Colwell v Chamberlain*, 43 N.J.L. 387; *Wells v City of Buffalo*, 14 (N.Y.) Hun. 438; *Layman v McBride*, 15 Ohio St. 573; *Noland v Costello*, 2 Ore. 57; *Common. v Sweeney*, 281 Pa. 550, 127 Atl. 226; *Womack v Garner (Tex.)* 31 S.W. 358; *State v Lawson*, 40 Wash. 455, 82 Pac. 750.

⁷⁰ *Draper v Falley*, 33 Ind. 465; *Common. v McNutt*, 133 Ky. 702, 118 N.W. 978; *Tranbarger v Chicago, etc., R. Co.*, 250 Mo. 46, 156 S.W. 694; *Morrison v St. Louis, etc., R. Co.*, 96 Mo. 602, 9 S.W. 626.

⁷¹ *Chambers v People*, 113 Ill. 509; *Marion v Campbell*, 266 Ill. 256, 107 N.E. 601. An endless reiteration of amendments, however, is not required. *Michaels v Hall*, 328 Ill. 11, 159 N.E. 278.

if all the sections of the old act are amended;⁷² if an entire section is amended, the entire new section must be set forth;⁷³ and if a section is divided into subdivisions, only those subdivisions which are amended need to be set forth and published.⁷⁴

§ 123. Statutes Required to Be Set Forth.—The constitutional provisions prohibiting amendment simply by reference to title and requiring the amendatory enactment to be set forth in full, apply only to those enactments which are strictly amendatory in their nature.⁷⁵ In other words, an enactment which does not amend an existing piece of legislation, is not subject to the requirements of constitutional provisions of the above type.⁷⁶ But, as is apparent, it is not always easy to determine when an act is strictly amend-

⁷² *In re Miller*, 29 Ariz. 582, 244 Pac. 376; *Board of Penitentiary Comrs. v Spencer*, 159 Ky. 255, 166 S.W. 1017; *State v Thurston*, 92 Mo. 325, 4 S.W. 930.

⁷³ *Martinsville v Frieze*, 33 Ind. 507; *Hickman v Kimbley*, 161 Ky. 652, 171 S.W. 176; *Board of Trustees v Scott*, 125 Ky. 545, 101 S.W. 944. If several sections are amended, each as amended should be set forth. *Hazelrigg v Hazelrigg*, 169 Ky. 345, 183 S.W. 933. Also see the following cases in connection with the text above and this note: *In re Campbell*, 143 Calif. 623, 77 Pac. 674; *Attorney-General v Loomis*, 141 Mich. 547, 105 N.W. 4; *Dist. Road Board v Spilman*, 117 Va. 201, 84 S.E. 103.

⁷⁴ *In re Miller*, 29 Ariz. 582, 244 Pac. 376; *Kokas v Common.*, 194 Ky. 44, 237 S.W. 1090; *State v City of Kearney*, 49 Neb. 325, 68 N.W. 533. Also see *Edrington v Payne*, 225 Ky. 86, 7 S.W. (2) 827. *Contra*: *Martinsville v Frieze*, 33 Ind. 507.

⁷⁵ *Bracely v Noble*, 201 Ala. 74, 77 So. 368; *State Highway Comm. v Otis*, 182 Ark. 242, 31 S.W. (2) 427; *Van Pelt v Hilliard*, 75 Fla. 792, 78 So. 693; *Timm v Harrison*, 109 Ill. 593; *Dodd v State*, 18 Ind. 56; *Rice v Hoskings*, 105 Mich. 303, 63 N.W. 311; *State v Ream*, 16 Neb. 681, 21 N.W. 398; *Pond Creek v Haskell*, 21 Okla. 711, 97 Pac. 338; *David v Portland Water Committee*, 14 Ore. 98, 12 Pac. 174; *Comm. v Samuel Black Co.*, 223 Pa. 74, 72 Atl. 261; *Davis v State*, 93 Tex. Cr. 192, 246 S.W. 395.

⁷⁶ *State v Trulock*, 109 Ark. 556, 160 S.W. 516; *People v Myers*, 206 Calif. 480, 275 Pac. 219; *People v Greer College*, 302 Ill. 538, 135 N.E. 80; *Hazelett v Butler Univ.*, 84 Ind. 230; *Troy v Atchinson, etc.*, R. Co., 11 Kan. 519; *McPherson v Gordon (Ky.)* 96 S.W. 791; *Bartholomew v Bartholomew*, 15 Mich. 370; *Palatine Ins. Co. v Northern Pac. R. Co.*, 34 Mont. 268, 85 Pac. 1032; *Munger v Beard*, 79 Neb. 764, 113 N.W. 214; *State v Cole*, 38 Nev. 488, 151 Pac. 944; *In re Haynes*, 54 N.J. L. 6, 22 Atl. 923; *People v Squire*, 10 N.Y.S. 633; *Cornman v Hagginbotham*, 227 Pa. 549, 76 Atl. 721.

atory,⁷⁷ although effect rather than form is the decisive factor.⁷⁸ Hence, a change in phraseology without changing the meaning or legal effect of a statute does not fall within the scope of this sort of a constitutional provision.⁷⁹ The same is true with a new statute which is complete and independent in itself;⁸⁰ and with a repealing act,⁸¹ since its purpose is to repeal an existing law in whole or in part;⁸² and with a reference statute,⁸³ since it is not strictly amenda-

⁷⁷ See *supra*, § 115. But note *State v Shafer*, 63 N.D. 128, 246 N.W. 874, that whether a statute is amended depends upon whether the law alleged to be amended, is permitted to remain, and something is added to, or taken from it.

⁷⁸ See *People v Greer College*, 302 Ill. 538, 135 N.E. 80. See also *Troy v Atchinson, etc., R. Co.*, 11 Kan. 519; *Underwood v McDuffee*, 15 Mich. 361; *Knisely v Cotterel*, 196 Pa. 614, 46 Atl. 861, 50 L.R.A. 86.

⁷⁹ *People v Myers*, 206 Calif. 480, 275 Pac. 219; *Gilbert v Moody*, 2 Idaho 747, 25 Pac. 1092; *Hazelett v Butler Univ.*, 84 Ind. 230; *Cornman v Hagginbotham*, 227 Pa. 549, 76 Atl. 721.

⁸⁰ *State v Burchfield*, 218 Ala. 8, 117 So. 483; *State v Roseberry (Ariz.)* 289 Pac. 515; *Galloovich v People*, 68 Colo. 299, 189 Pac. 34; *Tennant v Joerns*, 329 Ill. 34, 160 N.E. 160; *State v Greenwald*, 186 Ind. 321, 116 N.E. 296; *Hunter v City of Louisville*, 199 Ky. 834, 252 S.W. 119; *Shreveport v Nejin*, 140 La. 785, 73 So. 996; *People v Mahaney*, 13 Mich. 481; *Miller v Lamar Life Ins. Co.*, 158 Miss. 753, 131 So. 282; *State v Bennett (Mo.)* 11 S.W. 264; *King v Pony Gold Mining Co.*, 24 Mont. 470, 62 Pac. 783; *Mehrens v Greenleaf*, 119 Neb. 82, 227 N.W. 325; *State v Cole*, 38 Nev. 488, 151 Pac. 944; *State v Fargo Bottling Works*, 19 N.D. 396, 124 N.W. 387; *Bocox v Bixby*, 114 Okla. 269, 247 Pac. 20; *Zilesch v Polk County*, 107 Ore. 659, 215 Pac. 578; *Ruler v York County*, 290 Pa. 427, 139 Atl. 136; *Snyder v Compton*, 87 Tex. 374, 28 S.W. 1061; *State v Weber County Irr. Dist.*, 62 Utah 209, 218 Pac. 732; *Ex parte Settle*, 114 Va. 715, 77 S.E. 496; *Haynes v Seattle*, 83 Wash. 51, 145 Pac. 73. In *re Boulter*, 5 Wyo. 329, 40 Pac. 520. Similarly, supplemental legislation, complete in itself and not requiring reference to other existing legislation in order to ascertain its meaning or scope, does not come within the purview of these constitutional requirements: *Central Ky. Natural Gas Co. v Mt. Sterling*, 32 Fed. (2) 338; *People v Folignos*, 322 Ill. 304, 153 N.E. 373; *State v Guiney*, 55 Kan. 532, 40 Pac. 926.

⁸¹ *Johnson v Pinkley*, 141 Ark. 612, 217 S.W. 805; *Gross v Jefferson County*, 225 Ky. 641, 9 S.W. (2) 1006; *Barron v Smith*, 103 Md. 317, 70 Atl. 225; *State v LeBlond*, 108 Ohio St. 41, 140 N.E. 491; *Comm. v Cooper*, 277 Pa. 554, 121 Atl. 502. But see *Hicks v Davis*, 97 Kan. 312, 97 Kan. 662, 154 Pac. 1030, 156 Pac. 774.

⁸² For definition of "repealing act" see § 115, *supra*.

⁸³ *Hayes v State*, 221 Ala. 389, 128 So. 776; *State Highway Comm. v Otis*, 182 Ark. 242, 31 S.W. (2) 427; *Bloxton v State Highway Comm.*, 225 Ky. 324, 8 S.W. (2) 392; *Spratt v Helena Power Co.*, 37 Mont. 60, 94 Pac. 631; *People v Banks*, 67 N.Y. 568.

tory in its nature.⁸⁴ Nor need an act amending a previous enactment, which has been held unconstitutional, be set forth at length,⁸⁵ since an amendment of this type is not strictly amendatory.⁸⁶ And where a statute amends other legislation by implication only, the amendatory statute needs not to be published at length.⁸⁷ The exclusion of implied amendments from the scope of the constitutional provisions requiring amendatory acts to be set out at length as amended, is justified by the reasoning that the provisions were not intended to abolish the power to amend by implication. Moreover, to hold implied amendments within the scope of such provisions, would result in considerable confusion and cause the enactment of legislation to be a cumbersome and impractical process.

§ 124. Effect of Invalid Amendments, Generally.—Of course, if the amendatory statute is wholly void, the statute sought to be amended is not affected but remains in force.⁸⁸ It is as inoperative

⁸⁴ For definition of "amendment" see *supra*, §§ 78 and 115.

⁸⁵ *Cook v School District*, 266 Ill. 164, 107 N.E. 327. See also *McLean v Brodigan*, 41 Nev. 468, 172 Pac. 375.

⁸⁶ See § 117, *supra*.

⁸⁷ *Mills v Smith*, 177 Fed. 652, 101 C.C.A. 278; *Hayes v State*, 221 Ala. 389, 128 So. 776; *State v Roseberry (Ariz.)* 289 Pac. 515; *McKee v American Trust Co.*, 166 Ark. 480. And see *DeMotte v Demotte*, 364 Ill. 421, 4 N.E. (2) 960.

⁸⁸ *Frost v State Corp. Commission*, 278 U.S. 515, 73 L.Ed. 483, 49 S.Ct. 235, reversing 26 Fed. (2) 508; *Merritt v Gravenmier*, 169 Ark. 779, 277 S.W. 526; *Miller v Union Bank & Trust Co. (Calif.)* 59 Pac. (2) 1024; *Wilmington Trust Co. v Highfield (Del.)* 153 Atl. 864; *Barker v State*, 118 Ga. 35, 44 S.E. 874; *Chapman v Ada County*, 48 Idaho 632, 284 Pac. 259; *Ruban v City of Chicago*, 330 Ill. 97, 161 N.E. 133; *Ward v Common.*, 228 Ky. 468, 15 S.W. (2) 276; *Bangs v Fey*, 159 Md. 548, 152 Atl. 508; *In re Justices Opinion*, 269 Mass. 611, 168 N.E. 536, 66 A.L.R. 1477; *People v Rose*, 218 Mich. 642, 188 N.W. 417; *Holmes v State*, 146 Miss. 351, 111 So. 860; *State v Hartmann*, 299 Mo. 410, 253 S.W. 991; *Barker v Potter*, 55 Neb. 25, 75 N.W. 57; *State v Bailey*, 3 N.J. Misc. 297, 128 Atl. 389; *In re Markland*, 203 N.Y. 158, 96 N.E. 427; *Allen v City of Raleigh*, 181 N.C. 453, 107 S.E. 463; *State v Ehr*, 57 N.D. 310, 221 N.W. 883; *Binion v Dickison*, 138 Okla. 171, 280 Pac. 801; *State v Savage*, 96 Ore. 53, 184 Pac. 567, 189 Pac. 427; *White v White*, 108 Tex. 570, 196 S.W. 508; *Whitlock v Hawkins*, 105 Va. 242, 53 S.W. 401; *Reliance Auto Rep. Co. v Nugent*, 159 Wis. 488, 149 N.W. 377. Also see *Judson v Bessemer*, 87 Ala. 240, 6 So. 267, 4 L.R.A. 742; *Wilkison v Marion County Childrens Guardians*, 158 Ind. 1, 62 N.E. 481, for application of this rule, where the amendatory statute has been regarded as repealing the old statute. And in *State v Ehr*, 57 N.D. 310, 221 N.W. 883, where the unconstitutional amendment could not be severed from the amended act, the original act was unaffected, even though the amendment contained a repealing clause. For further treatment of Amendatory Acts, see Chapter XXVII, *infra*.

as if it had never been enacted;⁸⁹ or the act sought to be amended is, at least, reinstated in its effectiveness upon the established invalidity of the amendment.⁹⁰

⁸⁹ *Gay v Brent*, 166 Ky. 833, 179 S.W. 1051; *Smith v Dircks*, 233 Mo. 188, 223 S.W. 104, 4 L.R.A. 742. Consequently, a prosecution may be maintained under the original act. *People v Smith*, 246 Mich. 393, 224 N.W. 402.

⁹⁰ *Humphreys v Wall (Md.)* 181 Atl. 735.

CHAPTER XIII

REVISION, CODIFICATION AND COMPILATION

- § 125. In General.
- § 126. The Power to Revise, Codify or Compile.
- § 127. The Enactment or Adoption of Revisions and Codes, Generally.
- § 128. Title.
- § 129. General Effect of Adoption of a Code or Revision.
- § 130. Allocation of Constituent Statutes.
- § 131. Rearrangement of Individual Statutes.
- § 132. Alteration of Language.

§ 125. *In General.*—Legislatures are often authorized by constitutional provisions to revise and to restate all the statute law of a general and permanent nature of the state up to a certain date,¹ in corrected and improved form.² As a result, the lawmakers may revise existing statute law to any extent they deem necessary, so long as no constitutional limitation is exceeded.³ This restatement may be achieved either by a revision or a codification, and the published result referred to in numerous ways, such as Revised Statutes, Consolidated Laws, or Consolidated Code.

The object of a revision or codification, as just suggested, is to clarify existing statute law and make it easily found.⁴ Consequently,

¹ *Bales v State*, 63 Ala. 30; *Burke v Layoff*, 178 Ky. 588, 199 S.W. 775; *Rutledge v City*, 155 S.C. 520, 152 S.E. 700. For further treatment of revision, codification and compilation, see 59 *Corpus Juris*, §§ 480-497; and for their construction, see Chapter XXIX, *supra*.

² *Gibson v State*, 214 Ala. 38, 106 So. 231; *Pratt Institute v New York*, 183 N.Y. 151, 75 N.E. 1119; *Hartford Fire Insurance Co. v Walker*, 94 Tex. 473, 61 S.W. 711; *Becker v Green County*, 176 Wis. 120, 184 N.W. 715, 186 N.W. 584.

³ *Hart v State (Okla. Cr. Ap.)*, 60 Pac. (2) 411. And by virtue of the power to codify, certain general subjects, such as civil procedure, probate law, etc., may be individually codified.

⁴ *Hamilton v Rathbone*, 175 U.S. 414, 20 S.Ct. 155, 44 L.Ed. 219; *Central of Ga. R. Co. v. State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *State v Meares*, 148 S.C. 118, 145 S.E. 695; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019. To assist in achieving this purpose, the restatement is divided into chapters, *Cleaves v Jordan*, 35 Me. 429; titles, *Louisville Public Warehouse v Miller*, 26 Ky. L. 351, 81 S.W. 275, and articles or sections.

it is really more than a mere restatement.⁵ A re-examination of existing statute law is necessarily implied.⁶ But the restatement may be in the original language of the statute.⁷ Or words and phrases may be altered,⁸ new matter incorporated,⁹ and statutes even omitted¹⁰ from the revision or codification. And after the revision or codification has been adopted, it becomes the reservoir of all the statute law on the subjects indicated by the various titles;¹¹ the revision being a substitute for and displacing the former law.¹² As a result, any errors must be corrected by legislative amendments after the revision or code has been enacted into law.¹³

A compilation, however, is quite different from a revision or codification. It is simply a systematic arrangement rather than an alteration of existing statutory law.¹⁴ The original laws continue in force and are not replaced as in the case of a revision or codification.¹⁵ The omission of any statute from the compilation does not affect the existence of such statute, nor does the inclusion of any provision not previously enacted by the legislature in any way give it the effect and force of law.¹⁶ And a legislative approval of the compilation is simply an approval of the work of the compilers.¹⁷

§ 126. The Power to Revise, Codify or Compile.—We have already stated that constitutions frequently provide that the legislature shall revise and restate existing statute law.¹⁸ The actual

⁵ See *Becker v Green County*, 176 Wis. 120, 184 N.W. 715, 186 N.W. 584.

⁶ See cases under note 2, *supra*.

⁷ *Pratt Institute v N.Y.*, 183 N.Y. 151, 75 N.E. 1119; *Becker v Green County*, 176 Wis. 120, 184 N.W. 715, 186 N.W. 584.

⁸ *Pratt Institute v N.Y.*, 183 N.Y. 151, 75 N.E. 1119; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019.

⁹ *State v Towery*, 143 Ala. 48, 39 So. 309; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019.

¹⁰ *State v Towery*, 143 Ala. 48, 39 So. 309; *Rutledge v City*, 155 S.C. 520, 152 S.E. 700; *Briggs v Buckner* (Tex. Civ. Ap.) 19 S.W. (2) 190.

¹¹ *Burke v Layoff*, 178 Ky. 588, 199 S.W. 775; *Becker v Green County*, 176 Wis. 120, 184 N.W. 715, 186 N.W. 584.

¹² *Ex parte Autry* (Okla. Cr. Ap.) 50 Pac. (2) 239. But see *Dart v Bagler*, 110 Mo. 42, 19 S.W. 311.

¹³ *Broadbudd v Broadbudd*, 10 Bush. (Ky.) 299.

¹⁴ *Stewart v Riopelle*, 48 Mich. 177, 12 N.W. 36.

¹⁵ *Ibid.*

¹⁶ *Lyman v Martin*, 2 Utah 136.

¹⁷ *Lyman v Martin*, 2 Utah 136.

¹⁸ *Supra*, § 125.

work, however, is usually done by commissioners appointed by the legislature. The legislature will also usually define their powers, although in any event, the commissioners cannot create new laws nor alter existing legislation,¹⁹ for the enactment and alteration of law constitutes the exercise of legislative power.²⁰ Consequently, this power cannot be delegated to the revisors.²¹ Nor is the legislature bound by a revision or codification presented to it by the commissioners, as that would also constitute an infringement upon the legislative power.²² On the other hand, where the law provides for a compilation rather than a revision or codification, a legislative approval of the restatement is not necessarily needed.²³

§ 127. The Enactment or Adoption of Revisions and Codes, Generally.—In order for a revision or a code to be effective as law, a bill enacting or adopting the proposed code or revision must be passed by the legislature. The enactment must meet the usual requirements pertaining to the passage of statutes.²⁴ For instance, the bill must bear an appropriate title,²⁵ contain an enacting clause,²⁶ and go through the regular legislative process.²⁷

¹⁹ *Visant v Knox*, 27 Ark. 266; *Martin v Johnson*, 33 Fla. 287, 14 So. 725; *Georgia Central R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *Ex parte Hutchens*, 296 Mo. 331, 246 S.W. 186; *In re School Law Manual*, 63 N.H. 574, 4 Atl. 878; *Capley v Hudson* (Tex. Civ. Ap.) 286 S.W. 531.

²⁰ See *supra*, § 11.

²¹ *Mathis v State*, 31 Fla. 291, 12 So. 681; *Georgia Central R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *Bowen v Mo. Pac. R. Co.*, 118 Mo. 541, 24 S.W. 436; *State v Guant*, 13 Ore. 115, 9 Pac. 55.

²² *Martin v Johnson*, 33 Fla. 287, 14 So. 725.

²³ *Stewart v Riopelle*, 48 Mich. 177, 12 N.W. 36. Legislative approval of a compilation, if given, is only an approval and not the enactment of a new law. *Lyman v Martin*, 2 Utah 136.

²⁴ *Mathis v State*, 31 Fla. 291, 12 So. 681; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019; *Stevens v State*, 70 Tex. Cr. 565, 159 S.W. 505.

²⁵ See § 97, *infra*.

²⁶ *Mathis v State*, 31 Fla. 291, 12 So. 681; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019.

²⁷ *State ex inf. v Herring*, 208 Mo. 708, 106 S.W. 984. It must be read the required number of times in each house, *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019, although the reading of the laws included in the revision is not necessary. *Dew v Cunningham*, 28 Ala. 466; *Mathis v State*, 31 Fla. 291, 12 So. 681; *Georgia Central R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518. Also see § 35, *et seq.*, *supra*.

§ 128. **Title.**—The title to a bill enacting a revision or code, is sufficient if it relates to a unified subject.²⁸ As a result, the title may be quite comprehensive. In fact, titles as general and comprehensive as the following have been held sufficient: Revised Statutes,²⁹ Revised Civil Statutes,³⁰ Code of Civil Procedure,³¹ Code of Civil Practice,³² Criminal Code,³³ Penal Code,³⁴ and Probate Code.³⁵ Nor does such a title violate the constitutional provision which prescribes that no bill shall contain more than one subject which shall be expressed in the title.³⁶ All that is necessary is that the act shall not include any legislation so incongruous that it could not by any fair intendment, be considered germane to one general subject; otherwise, the constitutional provision would be a serious handicap to the enactment of legislation.³⁷

§ 129. **General Effect of Adoption of a Code or Revision.**³⁸—The enactment or adoption of a code or revision by the legislature

²⁸ *Marston v Humes*, 3 Wash. 267, 29 Pac. 520. But see *Vincent v Knox*, 27 Ark. 266, to the effect that if any original legislation is included in the revision, separate titles must be incorporated. Technically, this view is correct, since there is as much need for a proper title under such circumstances as where the legislature enacts independent legislation. But the title of a chapter is no part of the law and may be omitted without fatality. *Ferguson v Gentry*, 206 Mo. 189, 104 S.W. 104.

²⁹ *Martin v Johnson*, 33 Fla. 287, 14 So. 725.

³⁰ *McLane v Paschal*, 8 Tex. Civ. Ap. 398, 28 S.W. 711.

³¹ *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923.

³² *Porter v Thomson*, 22 Iowa 391.

³³ *Marston v Humes*, 3 Wash. 267, 29 Pac. 520.

³⁴ *Ex parte Pollard*, 40 Ala. 77.

³⁵ *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923.

³⁶ *Ex parte Thomas*, 113 Ala. 1, 21 So. 369; *Clarke v Meade*, 102 Calif. 516, 36 Pac. 862; *Martin v Johnson*, 33 Fla. 287, 14 So. 725; *Georgia Central R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *Cook v Marshall County*, 119 Iowa 384, 93 N.W. 372; *Johnston v Harrison*, 47 Minn. 575, 50 N.W. 923; *State v Dinnisse*, 109 Mo. 434, 19 S.W. 92; *State v Hedrick*, 88 Mont. 551, 294 Pac. 375; *Tribune Printing Co. v Barnes*, 7 N.D. 591, 75 N.W. 904; *McLaine v Paschal*, 8 Tex. Civ. Ap. 398, 28 S.W. 711; *State v Tieman*, 32 Wash. 294, 73 Pac. 375.

³⁷ *Johnson v Harrison*, 47 Minn. 575, 50 N.W. 923.

³⁸ For further treatment of codes and revisions, see § 324, et seq., infra.

has the same effect as if all the matter, both new³⁹ and altered,⁴⁰ therein contained, had been enacted as one general statute or act. Hence, all laws of a general and permanent nature which have been omitted from the revision are no longer law,⁴¹ and any matter which had never previously been enacted by the legislature, if included in the revision, nevertheless becomes operative as law.⁴² In other words, the provisions of a code enacted as a statute have the force of statute law.⁴³ Consequently, as in the case of statutes generally, no provision in a revision or codification becomes law until the code or revision has been legally enacted or adopted by the legislature.⁴⁴

Nor will the enactment of a code or revision render an unconstitutional law constitutional where the legislature had no power to enact the original law.⁴⁵ It would also seem that the re-enactment of a statute, previously declared unconstitutional by the courts, through the adoption of a codification, should not restore it to the status of a law necessitating a new judicial determination of its validity.⁴⁶ But a law which is unconstitutional simply on account of a failure on the part of the legislature to meet the constitutional

³⁹ *Gibson v State*, 214 Ala. 38, 106 So. 231; *Mathis v State*, 31 Fla. 291, 12 So. 681; *State v Davis*, 116 Kan. 211, 225 Pac. 1064; *Klingsmith v Siegel*, 57 N.D. 768, 224 N.W. 680; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019.

⁴⁰ *Georgia Central R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *State v Davis*, 116 Kan. 211, 225 Pac. 1064; *Herndon v State*, 16 Okla. Cr. 586, 185 Pac. 701; *Eddington v Union Portland Cement Co.*, 42 Utah 274, 130 Pac. 243; *Ex parte Bentine*, 181 Wis. 579, 196 N.W. 213.

⁴¹ *Hamilton v Rathbone*, 175 U.S. 414, 20 S.Ct. 155, 44 L.Ed. 219; *State v Towery*, 143 Ala. 48, 39 So. 309; *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019. But see *State ex rel v Smiley*, 317 Mo. 1283, 300 S.W. 459.

⁴² See *Langston v Canterbury*, 173 Mo. 122, 73 S.W. 151. But note *Barr v Flynn*, 20 Mo. Ap. 383.

⁴³ *Webb v United American Soda Fountain Co. (C.C.A.—Ga.)* 59 Fed. (2) 329.

⁴⁴ See *Mathis v State*, 31 Fla. 291, 12 So. 681.

⁴⁵ *Georgia Central R. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518; *Bowen v Missouri Pacific R. Co.*, 118 Mo. 541, 24 S.W. 436. Also see *Harris County v Crooker*, 112 Tex. 450, 248 S.W. 652.

⁴⁶ At least, where the revisors were unauthorized to include such a statute in the revision, its inclusion did not restore the unconstitutional statute to the status of law. *State v American Bank Co.* 75 Mont. 369, 243 Pac. 1093.

requirements pertaining to its passage, becomes a valid law upon the adoption of the code or revision.⁴⁷ This is true because the code constitutes but one legislative act,⁴⁸ and the defects of a statute constituting a part of the revision or code, are cured through the passage of the latter enactment.⁴⁹ Moreover, as a general rule, if the code or revision is legally enacted, all of the legislative acts therein contained will also be legally enacted.⁵⁰ On the other hand, the inclusion of an invalid statute in a compilation will not have any effect upon it⁵¹ whether the invalidity be due to defects in its enactment, or in its title,⁵² or in the power of the legislature to enact it.

§ 130. Allocation of Constituent Statutes.—Since the purpose of a revision or codification is to make the statute law of a state more systematic and easier located,⁵³ the power to relocate and to

⁴⁷ *Builders Supply Co. v Lucas*, 119 Ala. 202, 24 So. 416; *McFarland v Donaldson*, 115 Ga. 567, 41 S.E. 1000. Its validity is not, however, retroactive. *Bales v State*, 63 Ala. 30.

⁴⁸ See *Bertram v Commonwealth*, 108 Va. 902, 62 S.E. 969.

⁴⁹ For example the defect caused by the repeal or amendment of a former law by title alone is cured. *McFarland v Donaldson*, 115 Ga. 567, 41 S.E. 1000. A defective title is likewise cured. *Builder's Supply Co. v Lucas*, 119 Ala. 202, 24 So. 416; *Henderson-Waits Lumber Co. v Croft*, 89 Fla. 119, 103 So. 414; *Kennedy v Meara*, 127 Ga. 68, 56 S.E. 243; *Curoe v Spokane R. Co.*, 32 Idaho 643, 186 Pac. 1101, 37 L.R.A. 923; *Hall v Vunte*, 20 Ind. 304; *Green v State*, 33 Okla. Cr. 268, 243 Pac. 533, 244 Pac. 209; *Parks v Laurens Cotton Mills*, 75 S.C. 560, 56 S.E. 234; *Brady v Cooper*, 46 S.D. 419, 193 N.W. 246; *Bertram v Commonwealth*, 108 Va. 902, 62 S.E. 969; *Ex parte Bentine*, 181 Wis. 579, 196 N.W. 213. And see *American Indemnity Co. v Austin*, 112 Tex. 239, 246 S.W. 1019, where a constitutional provision assists in reaching this same result. But a defect in a statute's title will not be cured by re-enactment in a general revision not enacted as a general revision. *State ex rel Douglas v Bd. of Pub. Instruction*, 98 Fla. 66, 123 So. 540.

⁵⁰ But the inclusion by the revisors of a statute previously repealed by another revision, will not continue the repealed statute in force. *State v Nolte (Mo.)* 187 S.W. 896, rev. 203 S.W. 956.

⁵¹ *Wood v State*, 98 Fla. 703, 124 So. 44.

⁵² *State v Duval County Public Instruction Board*, 98 Fla. 66, 123 So. 540; *In re Riverton State Bank (Wyo.)* 49 Pac. (2) 637. But see *State v Freeman*, 143 Kan. 315, 55 Pac. (2) 362, that an act could not be attacked on the ground of insufficiency of title, after it was adopted in a revision. Also see, *McConville v Ft. Pierce Bank & Trust Co. (Fla.)* 135 So. 392; *Cashen v Northern Pac. Ry. Co. (Mont.)* 28 Pac. (2) 862; *Gresham v Hunter Corp. (Tex. Civ. Ap.)* 53 S.W. (2) 687.

⁵³ See *supra*, § 125.

classify permits the legislature, through its revisors, to place the various existing statutes under different but germane titles.⁵⁴ The new title may be very comprehensive.⁵⁵ And the position which a statute occupies in the revision or codification apparently does not in any way affect its force as law.⁵⁶

§ 131. Rearrangement of Individual Statute.—In the effort to make the statute law more systematic, the individual statute may also be rearranged; that is, sections may be placed in different order, combined, or subdivided. This will not change the effect of the statute subjected to internal rearrangement, in the absence of a clear expression or indication to the contrary.⁵⁷

§ 132. Alteration of Language.—Not only may the statutes composing the codification be relocated but their language may also be changed. Generally, however, the revision is simply a restatement of existing statute law,⁵⁸ either in the same or in substantially the same language. Where this is true, the old statutes are continued without any change in their meaning.⁵⁹ But in many instances, the

⁵⁴ *Clarke v Mead*, 102 Calif. 516, 36 Pac. 862; *McCue v Peery*, 293 Mo. 225, 238 S.W. 798; *State v Hedrick*, 88 Mont. 551, 294 Pac. 375. Also note the language in *Gillespie v State*, 9 Ind. 380, 386.

⁵⁵ Habitual criminal act placed under "Management of Penitentiary", In re Kline, 6 Ohio Cir. Ct. 215; wills under general title of "Administration," *McCue v Peery*, 293 Mo. 225, 238 S.W. 798. Also see *Clarke v Mead*, 102 Calif. 516, 36 Pac. 862.

⁵⁶ See *Paulson v Hurlburt*, 93 Ore. 419, 183 Pac. 937.

⁵⁷ *Buck Stove & Range Co. v Vickers*, 226 U.S. 205, 57 L.Ed. 189, 33 S.Ct. 41; *General Inv. Co. v Lake Shore & M. S. R. Co.*, 260 U.S. 261, 67 L.Ed. 244, 43 S.Ct. 106; *Davis v Davis*, 75 N.Y. 221.

⁵⁸ See *State v Holland*, 117 Me. 288, 104 Atl. 159.

⁵⁹ *U.S. v Bathgate*, 246 U.S. 220, 62 L.Ed. 676, 38 S.Ct. 269; *People v Drake*, 162 Calif. 248, 121 Pac. 1006; *Atlas Rock Co. v Miami Beach Builders Supply Co.*, 89 Fla. 340, 103 So. 615; *Robinson v Ferguson*, 119 Iowa 325; *State v Davis*, 116 Kan. 211, 225 Pac. 1064; *Byfield v City of Newton*, 247 Mass. 46, 141 N.E. 658; *Wipperman Mercantile Co. v Jacobson*, 133 Minn. 326, 158 N.W. 606; *Timson v Manuf. Coal Co.*, 220 Mo. 580, 119 S.W. 565; *Wells v Dice*, 33 N.M. 647, 275 Pac. 90; *People v Moskowitz*, 196 N.Y.S. 634, 119 Misc. 837; *In re Cross' Estate*, 278 Pa. 170, 122 Atl. 267; *Sheftels v Tobert*, 46 Wis. 439, 1 N.W. 156.

language of existing statutes are substantially altered; words may be added or omitted; phraseology and punctuation changed. In such instances, however, there is a presumption that the legislature did not intend to change the meaning of the statute, unless the intent to do so is clearly apparent.⁶⁰ Where it is the intent of the legislature to make a change in the statute's meaning, it must be given effect.⁶¹

⁶⁰ *Federal Reserve Bank v Webster*, 287 Fed. 579; *Hartford Builders Finish Co. v Anderson*, 99 Conn. 343, 122 Atl. 76; *Greenfield v Farrell Heating Co.*, 17 Ga. Ap. 637, 87 S.E. 912; *Wipperman Mercant. Co. v Jacobson*, 133 Minn. 326, 158 N.W. 606; *People v Fanshawe*, 137 N.Y. 68, 32 N.E. 1102; *German Am. Ins. Co. v McBee*, 85 Ohio St. 161, 97 N.E. 378; *Sheafer v Mitchell*, 109 Tenn. 181, 71 S.W. 86; *Braun v State*, 40 Tex. Cr. 236, 49 S.W. 620. Simply giving sections new numbers does not alter the force of the act composed of such sections. *Strottman v St. Louis R. Co.*, 211 Mo. 227, 109 S.W. 769. Any change is presumed to simplify the language rather than to alter the law. *Walker v Finance Co.*, 46 Ariz. 224, 49 Pac. (2) 1005.

⁶¹ *Vance v Vandercook Co.*, 170 U.S. 438, 42 L.Ed. 1100, 18 S.Ct. 674; *Ex parte Lawler*, 185 Ala. 428, 64 So. 102; *Common. v New York Cent. R. Co.*, 206 Mass. 417, 92 N.E. 766; *In re Cravens Estate*, 177 Minn. 437, 225 N.W. 398; *Burnham v Stevens*, 33 N.H. 347; *State v Williams*, 104 Ohio St. 56, 141 N.E. 654; *State v Burgess*, 101 Tex. 524, 109 S.W. 922; *State v Ritchie*, 32 Utah 381, 91 Pac. 24; *Barnard v Barnard*, 132 Va. 155, 111 S.E. 227. For treatment of the Construction of Codes, Revisions and Compilations, see Chapt. XXIX, *infra*.

CHAPTER XIV

REPEALS

- § 133. The Power to Repeal.
- § 134. Express Repeals.
- § 135. Inconsistent Statutes and Provisions.
- § 136. Identification of the Act to Be Repealed—Title.
- § 137. Implied Repeals, Generally.

§ 133. **The Power to Repeal.**—The power to repeal,¹ that is, the power to abrogate,² or revoke³ existing legislation, is, of course, a legislative function or attribute.⁴ It is also an extensive

¹ For comparison with the power to amend, see § 115, *supra*. And see Chapter XXVIII, *infra*, for the construction of repealing acts.

² *State v Hubbard*, 148 Ala. 391, 41 So. 903; *St. Louis v Kellman*, 235 Mo. 687, 139 S.W. 443; *Butte, etc., Consolid. Mining Co. v Montana Ore Purchasing Co.*, 24 Mont. 125, 60 Pac. 1039.

³ *Oakland Paving Co. v Hilton*, 69 Calif. 479, 11 Pac. 3; *Jesse v DeShong* (Tex.) 105 S.W. 1011.

⁴ See *supra*, § 11. Also note *Mix v Illinois Central R. Co.*, 116 Ill. 502, 6 N.E. 42. Still, statutes may be repealed by non-user or desuetude. "The instances are numerous of statutes being repealed in fact—a kind of silent legislation. As to the abrogation of statutes by 'non-user,' there may rest some doubt; for myself, I own my opinion is, that 'non-user' may be such as to render them obsolete, when their objects vanish or their reason ceases. The common law (and this is but a customary punishment) what is it, but common usage. The long desuetude of any law amounts to its repeal . . . It certainly requires very strong grounds to presume a law obsolete, yet as the whole community includes as well the legislative power as its subjects, total disuse of any civil institution for ages past, may afford just and rational objections against disrespected and superannuated ordinances . . . Time silently and gradually introduces; it silently and gradually withdraws its customary laws." *James v Common*. (Pa.) 12 Serg. & R. 220, 228. "We would hesitate, even with some authority to sustain us, before we declared an act founded on our statute book obsolete from desuetude. But when that declaration has been made more than a century by an eminent jurist and the earliest compiler of our statute law, we may safely adopt his conclusion, especially in reference to the provisions of an act so inapplicable at the present day. The act is not only inoperative from non-user, but the offender could not now be punished in the manner provided." *O'Hanlon v Myers* (S.C.) 10 Rich. 128. "Though I do not think this act is repealed by non-user, I cannot assent to the doctrine that the usages and customs of an advancing people are incapable of displacing an act of assembly that has become unfitted for modern use." *Appeals of Porter*, 30 Pa. 496. *Contra: McKeown v State* (Ark.) 124 S.W. (2) 19.

power, and any statute is subject to its exercise, even those which have been enacted by the initiative process,⁵ except insofar as it is prohibited or limited by provisions found in the constitution.⁶ Nevertheless, the power has its limits. In this connection, it should be noted that after a referendum has been invoked and until the voters have acted thereon, the referred law cannot be repealed.⁷ Nor can the legislature, as a general rule, enact legislation that is irrepealable,⁸ or even limit or abridge the power of succeeding legislatures to repeal legislation.⁹ Clearly, therefore, any statute subject to repeal, may be repealed in its entirety or in part,¹⁰ either by necessary implication¹¹ or by the express provision of subsequently enacted legislation.¹²

§ 134. Express Repeals.—Repeals of this character are those which expressly declare that an existing law is thereby abrogated

⁵ In re Senate Resolution, 54 Colo. 262, 130 Pac. 333.

⁶ *People v Rinner*, 52 Calif. Ap. 747, 199 Pac. 1066; *Common. v Ewald, Iron Co.*, 153 Ky. 116, 154 S.W. 931; *Musgrove v Vicksburg*, 50 Miss. 677; *State v Becker (Mo.)* 240 S.W. 229; *Engle v Reichard*, 4 Pa. Co. 48. The authority to repeal a local law includes the authority to repeal it in part. *Johnson v Simpson (Ark.)* 51 S.W. (2) 233. And, of course, a repeal cannot destroy vested contract or property rights. *Highsmith v Funeral Co. (Ala.)* 182 So. 18.

⁷ In re Opinion of Justices, 132 Me. 512, 174 Atl. 853.

⁸ *State v State Exec. Council*, 207 Iowa 923, 223 N.W. 737; *Common. v Ewald Iron Co.*, 153 Ky. 116, 154 S.W. 931; *State v Highway Comm. (Mont.)* 296 Pac. 1033; *Langdon v New York*, 93 N.Y. 129; *State v Coyle*, 7 Okla. Cr. 50, 122 Pac. 243; In re *Shackamax Bank*, 4 Pa. Co. 194. But a contract or grant by the legislature is binding on succeeding legislatures. *Winter v Jones*, 10 Ga. 190, 54 Am.Dec. 379.

⁹ *Nevada County v Hicks*, 48 Ark. 515, 3 S.W. 524; *Mix v Illinois Central R. Co.*, 116 Ill. 502, 6 N.E. 42; *Taylor v Strayer*, 167 Ind. 23, 78 N.E. 236; *State v Barker*, 4 Kan. 379; *Wright v Wright*, 2 Md. 429; *Harsha v City of Detroit*, 261 Mich. 586, 246 N.W. 849; *Matthews v Raff*, 45 Ohio Ap. 242, 186 N.E. 887. But the power of later legislatures is to a certain degree affected or limited by statutes which prescribe rules of construction to be applied to statutes thereafter enacted, in the absence of a different intent. *Friend v Levy*, 76 Ohio St. 26, 80 N.E. 1036; *Prentiss v Danaher*, 20 Wis. 311.

¹⁰ *Johnson v Simpson (Ark.)* 51 S.W. (2) 233; *St. Louis v Kellman*, 235 Mo. 687, 139 S.W. 443; *State v Washoe County*, 52 Nev. 379, 287 Pac. 957.

¹¹ See § 137, *infra*.

¹² See § 134, *infra*.

or annulled.¹³ Sometimes the particular law, or laws, or provisions thereof which are to be repealed, are expressly pointed out and declared repealed by the repealing act. On other occasions, the new enactment may declare that all laws or parts of laws inconsistent therewith are repealed.¹⁴ Where the former type of express repeal is couched in general terms, it will operate to repeal not only those laws pertaining to the same subject which are inconsistent with the new law,¹⁵ but all other laws which come within its scope.¹⁶

§ 135. **Inconsistent Statutes and Provisions.**¹⁷ — Where the repealing act does not specifically point out the law or laws which it abrogates but merely provides that all laws and parts of laws in conflict, or inconsistent, with the new act are thereby repealed, considerable difficulty is encountered in determining whether certain laws are inconsistent. Yet, in order to be repealed, the law in question must actually be inconsistent.¹⁸ It must be repugnant and irreconcilable with the repealing act.¹⁹ On the other hand, if the law, in part or in its entirety, is not inconsistent, it will remain in

¹³ *St. Louis v Kellman*, 235 Mo. 687, 139 S.W. 443; also see *Maresca v U.S.*, 277 Fed. 727; *Brockman v Board of Directors (Ark.)* 66 S.W. (2) 619; *Shinners v Royal Coal Co.*, 188 Ill. Ap. 335; *People v Travis*, 160 N.Y.S. 737.

¹⁴ Some authorities regard this as an implied repeal. *State v County Court*, 54 Ore. 255, 101 Pac. 907, reh. den. 54 Ore. 255, 103 Pac. 446; *Hibbett v Pruitt*, 162 Tenn. 285, 36 S.W. (2) 897; *Gaddis v Terrell*, 101 Tex. 574, 110 S.W. 429; *Batchelor v Palmer*, 129 Wash. 150, 224 Pac. 685. *Contra*: *State v Schaumburg*, 149 La. 470, 89 So. 536; *State v Western Union Tel. Co.*, 111 Minn. 21, 124 N.W. 380; *State v Board of Comm'rs.*, 29 Ohio Ap. 364, 163 N.E. 585; *Common. v Lomas*, 302 Pa. 97, 153 Atl. 124; *Madison v Southern Wis. R. Co.*, 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910.

¹⁵ *The San Pedro (U.S.)* 2 Wheat. 132, 4 L.Ed. 202.

¹⁶ *Ogden v Witherspoon*, 18 Fed. Cas. 10,461; *State v Fuller*, 14 La. Ann. 667; *Wilcox v Cheviott*, 92 Me. 239, 42 Atl. 403.

¹⁷ See cases under note 14, *supra*; also §§ 308-315, *infra*.

¹⁸ *U.S. v Henderson (U.S.)* 11 Wall. 652, 20 L.Ed. 235; *Maxwell v State*, 89 Ala. 150, 7 So. 824; *Jones v Oldham*, 109 Ark. 24, 158 S.W. 1075; *People v Hausen*, 276 Ill. 204, 114 N.E. 596; *Prowse v Board of Educ.*, 134 Ky. 365, 120 S.W. 307; *Nichols v Hobbs (Mo.)* 197 S.W. 260; *Barden v Wells*, 14 Mont. 462, 36 Pac. 1076; *State v Drexel*, 74 Neb. 776, 105 N.W. 174; *Common. v Curry*, 285 Pa. 289, 132 Atl. 370; *Hibbett v Pruitt*, 162 Tenn. 285, 36 S.W. (2) 897; *Milwaukee v Halsey*, 149 Wis. 82, 136 N.W. 139.

¹⁹ *St. Paul Foundry Co. v Burnstad School Dist. (N.D.)* 269 N.W. 738.

force to the extent of its consistency.²⁰ But mere inconsistency on the part of a repealing act with a special or local law, does not repeal the latter.²¹ There must be in such cases some other indication of the legislative intent to repeal.²²

§ 136. Identification of the Act to Be Repealed—Title.—Of course, in order for an express repeal to be effective, except those which merely state that all inconsistent laws shall be repealed, the law or laws to be repealed must be properly designated or identified.²³ Otherwise, it would be impossible to know which laws were intended to be abrogated.²⁴ Usually, any means of identification which will indicate with reasonable certainty the law to be repealed, will suffice.²⁵ In accord with this principle, the identification may be made by reference to title, caption, subject, or subject matter.²⁶ In at least one state, however, a constitutional provision prohibits a repeal simply by reference to title.²⁷ Where this is the situation,

²⁰ *Common. v Lomas*, 302 Pa. 97, 153 Atl. 124; *Madison v Southern Wis. R. Co.*, 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910.

²¹ *St. Louis, etc., R. Co. v Grayson*, 72 Ark. 119, 78 S.W. 777; *Million v Metrop. Cas. Ins. Co. (Ind.)* 172 N.E. 569; *State v Fiala*, 47 Mo. 310; *Brown v Mullica*, 48 N.J.L. 447, 4 Atl. 427; *Casterton v Vienna*, 163 N.Y. 368, 57 N.E. 622.

²² *O'Harra v Johnson (Pa.)* 2 Walk. 115; *Mussina v Clinton County*, 35 Pa. Co. 155. "Irreconcilable inconsistency", however, may be sufficient. See *Jones v Oldham*, 109 Ark. 24, 158 S.W. 1075.

²³ *Holt v Mobile School*, 29 Ala. 451; *Lowman v Billington*, 119 N.Y.S. 825; *Common. v Central Pass. R. Co.*, 52 Pa. 506.

²⁴ See *Warren v Walker*, 167 Tenn. 505, 71 S.W. (2) 1057, that the purpose of the constitutional requirement that the substance of the repealed law be recited in the repealing act, is to assure definite notice of what is being done.

²⁵ *Minter v State*, 145 Tenn. 678, 238 S.W. 89; *Learn v Learn*, 30 Ind. 171. Mere inaccuracy or error will not nullify the repeal, if the act to be repealed can be ascertained. *State v Pierce*, 51 Kan. 241, 32 Pac. 924, *aff'd* 51 Kan. 246, 33 Pac. 368; *Equitable Life Assur. Soc. v Hart*, 55 Mont. 76, 173 Pac. 1062; *Richards v State*, 65 Neb. 808, 91 N.W. 878; *State v Sizemore*, 199 N.C. 687, 155 S.E. 724. And the designation may be made in the body or in the title or caption of the repealing act. *San Diego County Sav. Bank v Burns*, 104 Calif. 473, 38 Pac. 102; *House v Creveling*, 147 Tenn. 589, 250 S.W. 357.

²⁶ See cases under note 23, *supra*.

²⁷ See *Holland v State*, 155 Ga. 795, 118 S.E. 203; also see note 28, *infra*. For further treatment of implied repeals, especially with reference to the principles of construction, see § 308, *infra*.

some other means of identification must be used in addition to referring to the title of the act to be repealed, such as a reference to the date and the contents.²⁸

§ 137. Implied Repeals, Generally.—Repeals of this type are those which take place when a subsequently enacted law contains provisions contrary to those of an existing law but no provisions expressly repealing them. Such repeals have been divided into two general classes;²⁹ those which occur where an act is so inconsistent or irreconcilable with an existing prior act that only one of the two can remain in force,³⁰ and those which occur when an act covers the whole subject of an earlier act and is intended to be a substitute therefor.³¹ As has been suggested, a repeal takes place under these circumstances, even though the new act contains no

²⁸ *Holland v State*, 155 Ga. 795, 118 S.E. 203. Also see § 119, *supra*, as to the identification of the act to be amended.

²⁹ *Anthony v St. Louis, etc., R. Co.*, 108 Ark. 219, 157 S.W. 394; *Smith v Mathews*, 155 Calif. 752, 103 Pac. 199; *State v Donovan*, 28 Dela. 40, 90 Atl. 220; *McGregor v Clark*, 155 Ga. 377, 116 S.E. 823; *Exall v Holland*, 166 Ky. 315, 179 S.W. 241; *State v Intoxicating Liquors*, 119 Me. 1, 109 Atl. 257; *Huntsville v Eatherton (Mo.)* 182 S.W. 767; *Atlantic County v Bugbee*, 98 N.J.L. 423, 119 Atl. 785; *People v Dwyer*, 215 N.Y. 46, 109 N.E. 103; *State Sanatorium v State Treasurer*, 173 N.C. 810, 92 S.E. 689; *State v Malheur County Ct.*, 54 Ore. 255, 101 Pac. 907, 103 Pac. 446; *Stonoga Coke & Coal Co. v Southern Steel Co.*, 123 Tenn. 428, 131 S.W. 988; *Ex parte Turner*, 92 Vt. 210, 102 Atl. 948; *White v North Yakima*, 87 Wash. 191, 151 Pac. 645; *Beck v Cox*, 77 W.Va. 442, 87 S.E. 492.

³⁰ *Lewis v U.S.*, 244 U.S. 134, 61 L.Ed. 1039, 37 S.Ct. 570; *Rawls v Doe*, 23 Ala. 240; *Allison v Phoenix (Ariz.)* 33 Pac. (2) 927, 93 A.L.R. 354; *Ex parte Trapnall*, 6 Ark. 9; *Yolo County v Colgan*, 132 Calif. 265, 64 Pac. 403; *Galpin v Chicago*, 269 Ill. 27, 109 N.E. 713; *Edgar v Greer*, 8 Iowa 394; *Arkansas City v Turner*, 116 Kan. 407, 266 Pac. 1009; *Davis v State*, 7 Md. 151; *State v Klasen*, 123 Minn. 382, 143 N.W. 984; *State v Wilson*, 43 N.H. 415; *State v Massey*, 103 N.C. 356, 9 S.E. 632; *Ludlow v Johnston*, 3 Ohio 553; *Huston v Scott*, 20 Okla. 142, 94 Pac. 512; *Rowe v Richards*, 32 S.D. 66, 142 N.W. 664; *Hogan v Nashville R. Co.*, 131 Tenn. 244, 174 S.W. 1118; *Nelden v Clark*, 20 Utah 382, 59 Pac. 524.

³¹ *Gilpin v U.S.*, 256 U.S. 10, 65 L.Ed. 807, 41 S.Ct. 419; *State v Kolb*, 201 Ala. 439, 78 So. 817; *Morris v Indianapolis*, 177 Ind. 369, 94 N.E. 704; *People v Marxhausen*, 204 Mich. 559, 171 N.W. 557, 3 A.L.R. 1505; *In re Third Street*, 177 Minn. 146, 225 N.W. 86, 74 A.L.R. 561; *Pratt Institute v New York*, 183 N.Y. 151, 75 N.E. 1119; *State v McCafferty*, 25 Okla. 2, 105 Pac. 992; *Bradley Engineering Co. v Muzzy*, 54 Wash. 227, 103 Pac. 37; *Cunningham v Cokely*, 79 W.Va. 60, 90 S.E. 546.

repealing clause,³² and in face of the fact that there may be a constitutional provision prohibiting the repeal of any law simply by reference to its title or section number.³³ The validity of such a repeal is sustained on the ground that the last expression of the legislative will should prevail.³⁴ Technically, there is perhaps a violation of the constitutional provision but from a practical standpoint the circumvention can be easily justified.

³² See cases under note 30, *supra*. Indeed, a statement in a statute that all parts of inharmonious laws are thereby repealed, adds nothing to the effect of a statute as constituting a repeal by implication. *People v Mills*, 354 Ill. 641, 188 N.E. 829.

³³ *St. Petersburg v English*, 54 Fla. 585, 45 So. 483; *Durham v State*, 166 Ga. 561, 144 S.E. 109; *Geisen v Heiderich*, 104 Ill. 537; *Branham v Lange*, 16 Ind. 497; *People v Mahaney*, 13 Mich. 481; *Stingily v Jackson*, 140 Miss. 19, 104 So. 465; *Lehman v McBride*, 15 Ohio St. 573. For that matter, the constitutional provisions prescribing that no act shall contain more than one subject, *Geisen v Heiderich*, *supra*, that an act which repeals existing laws shall recite in its caption or otherwise, the title or substance of the law repealed, *Gamble v State*, 159 Tenn. 446, 19 S.W. (2) 279, or that an amended act shall be set forth at length; *Stingily v Jackson*, 140 Miss. 19, 104 So. 465; *Schott v Continental Auto Ins. Underwriters (Mo.)* 31 S.W. (2) 7, *Patton v Withycombe*, 81 Ore. 210, 159 Pac. 78, need not be met. Also see *New York Central R. Co. v Stevenson*, 277 Ill. 474, 115 N.E. 633, to the effect that implied repeals are not within any constitutional prohibition.

³⁴ *New York, etc., R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 32 Atl. 953, 29 L.R.A. 367.

CHAPTER XV

DETERMINATION OF REGULARITY OF ENACTMENT

§ 138. In General.

§ 139. Conclusiveness of the Enrolled Bill.

§ 140. The Journal Entry Rule.

§ 141. Sufficiency of Journal Entries.

§ 142. Conclusiveness of Journals.

§ 143. Miscellaneous Evidence of Legality of Enactment.

§ 138. In General.—The power to determine the regularity of the passage of a legislative enactment is, of course, vested in the judiciary or the courts,¹ for it is a part of the judicial power.² Through its exercise, the court may determine whether a statute has been enacted in conformity with the constitution, such as meeting the requirements that the title shall contain but one subject,³ or that the act shall be published at length,⁴ or is void because of some defect.⁵ But the court will not of its own motion,⁶ or simply upon a hypothetical case,⁷ inquire into the validity of the passage

¹ *Portland Gold Mining Co. v Duke*, 191 Fed. 692, 113 C.C.A. 316; *Sims v Weldon*, 165 Ark. 13, 263 S.W. 42; *Smith v Chase*, 91 Fla. 1044; *Neiberger v McCullough*, 253 Ill. 312, 97 N.E. 660; *Sackrider v Saginaw County*, 79 Mich. 59, 44 N.W. 165; *Standard Underground Cable Co. v Atty.-General*, 46 N.J.L. 270, 19 Atl. 733; *Ritchie v Richards*, 14 Utah 345, 47 Pac. 670.

² *Lyons v Woods*, 153 U.S. 649, 38 L.Ed. 854, 14 S.Ct. 959; *Sherman v Story*, 30 Calif. 253; *Scott v Clark County*, 34 Ark. 283; *Nesbit v People*, 19 Colo. 441, 36 Pac. 221; *Ramsey County v Heeman*, 2 Minn. 330; *Ayar's Appeal*, 122 Pa. 266, 16 Atl. 356, 2 L.R.A. 577; *Blessing v Galveston*, 42 Tex. 641.

³ *Hayes v Walker*, 54 Fla. 163, 44 So. 747.

⁴ *Edrington v Payne*, 225 Ky. 86, 7 S.W. (2) 827.

⁵ *State v Milwaukee County Bd.*, 159 Wis. 249, 150 N.W. 554 (uncertainty).

⁶ At least, not unless the defects are obvious. *Tuttle v Wood* (Tex. Civ. Ap.) 35 S.W. (2) 1061.

⁷ But note how close to this the declaratory judgment statutes come. See *Borchard, Declaratory Judgments*, p. 50.

of a statute. Nor will it inquire into the wisdom or expediency of any legislation.⁸

According to some authorities, the objection that a statute has not been enacted in conformity with the constitution, does not need to be pleaded.⁹ The better view, however, at least, for practical purposes, is the one which requires the pleader to point out the provisions of the constitution which have been violated by the legislature,¹⁰ even in face of the rule that matters of law need not be pleaded.¹¹

In determining the validity of an enactment, the court cannot go beyond certain bounds. It cannot go into the election and qualification of members of the legislature,¹² nor into its organization.¹³ Mere matters of parliamentary law must not be considered.¹⁴ Nor will the court consider whether the joint rules of the legislature

⁸ *Hunter v Pittsburg*, 207 U.S. 161, 52 L.Ed. 151, 28 S.Ct. 40; *Stillwell v Jackson*, 77 Ark. 250, 93 S.W. 71; *State v Bryan*, 50 Fla. 293, 39 So. 929; *People v Rose*, 203 Ill. 46, 67 N.E. 746; *State v Menaugh*, 151 Ind. 113, 87 N.E. 966; *McGuire v Chicago, etc., R. Co.*, 131 Iowa 340, 108 N.W. 902; *Gardner v Ray*, 154 Ky. 509, 157 S.W. 1147; *Squire v Tellier*, 185 Mass. 18, 69 N.E. 312; *New York Life Ins. Co. v Hamburger*, 174 Mich. 254, 140 N.W. 510; *State v Wagener*, 77 Minn. 483, 80 N.W. 633; *Young v Kansas City*, 152 Mo. 661, 54 S.W. 535; *Ex Parte Boyce*, 27 Nev. 299, 75 Pac. 1; *McGovern v Hope*, 63 N.J.L. 76, 42 Atl. 830; *Fifth Avenue Coach Co. v New York*, 94 N.Y. 10, 86 N.E. 824; *In re Likens*, 223 Pa. 456, 72 Atl. 858; *Seegars v Seaboard Air Line R. Co.*, 73 S.C. 71, 52 S.E. 797; *Common. v Henry*, 110 Va. 879, 65 S.E. 570; *Julien v Model Bldg. Assoc.*, 116 Wis. 79, 92 N.W. 561, 61 L.R.A. 668.

⁹ *Portland Gold Mining Co. v Duke*, 191 Fed. 692, 113 C.C.A. 316. See also *People v Marlborough Highway Commrs.*, 54 N.Y. 345, 28 N.E. 358, 14 L.R.A. 481, and Note 40 L.R.A. (n.s.) 38.

¹⁰ *People v Bristol (Colo.)* 20 Pac. (2) 309; *Rio Grande Sampling Co. v Catlin*, 40 Colo. 450, 94 Pac. 323; *Stelling v Kansas City*, 85 Kan. 397, 116 Pac. 511; *Pumpelly v Owego*, 45 How. Pr. (N.Y.) 219. See also *Woodbridge Township v Middlesex Water Co. (N.J. Ch.)* 68 Atl. 464, and cases cited in 12 C.J. 785, § 216.

¹¹ *Waterloo Woolen Mfg. Co. v Shanahan*, 128 N.Y. 345, 28 N.E. 358, 14 L.R.A. 481.

¹² *Lyons v Woods*, 153 U.S. 649, 38 L.Ed. 854, 14 S.Ct. 959; *Hughes v Felton*, 11 Colo. 489, 19 Pac. 444; *Gormley v Taylor*, 44 Ga. 76; *Auditor-General v Menominee County*, 89 Mich. 552, 51 N.W. 483; *Chavez v Luna*, 5 N.M. 183, 21 Pac. 344; *Sherrill v O'Brien*, 188 N.Y. 185, 81 N.E. 124.

¹³ *Ibid.*

¹⁴ *State v New London Sav. Bank*, 79 Conn. 141, 64 Atl. 5, *Crawford v Gilchrist*, 64 Fla. 41, 59 So. 963; *Welborn v Akin*, 44 Ga. 420; *Smith v Jennings*, 67 S.C. 324, 45 S.E. 821. But see *State v Moore*, 37 Neb. 13, 55 N.W. 299.

have been observed,¹⁵ or whether the legislature has conformed to directions contained in other statutes regarding the enactment of laws.¹⁶ The court will merely ascertain whether the statute has been enacted in compliance with the provisions of the constitution.¹⁷ But there is a presumption that such provisions have been complied with by the legislature, both as to substance as well as to form and enactment.¹⁸ Such presumptions are, however, but *prima facie*,¹⁹ and hence rebuttable.

¹⁵ *St. Louis, etc., R. Co. v Gill*, 54 Ark. 101, 15 S.W. 19, 11 L.R.A. 452, aff. 156 U.S. 649, 39 L.Ed. 567, 15 S.Ct. 484; *Hunt v Wright*, 70 Miss. 298, 11 So. 608; *In re Ryan*, 80 Wis. 414, 50 N.W. 187.

¹⁶ *State v Septon*, 3 R.I. 119.

¹⁷ *State v Hand*, 96 Fla. 799, 97 Pac. 878, 119 So. 376; *Foutch v Zempel*, 332 Ill. 192, 163 N.E. 546; *McChesney v Sampson*, 232 Ky. 395, 23 S.W. (2) 584; *Bd. of Purification of Waters v Town of East Providence*, 47 R.I. 431, 133 Atl. 812; *State v Cumberland Club*, 136 Tenn. 84, 188 S.W. 583.

¹⁸ *Bradley v Richmond*, 227 U.S. 477, 57 L.Ed. 603, 33 S.Ct. 318; *Spear v Ward (Ala.)* 74 So. 27; *Cummings v Rosenberg*, 12 Ariz. 327, 100 Pac. 810; *Graham v Nix*, 102 Ark. 277, 144 S.W. 214; *Gridley v Fellows*, 166 Calif. 765, 138 Pac. 355; *Consumers' League v Colorado R. Co.*, 53 Colo. 54, 125 Pac. 577; *State v Lay*, 86 Conn. 141, 84 Atl. 522; *State v Grier*, 27 Del. 322, 88 Atl. 579; *Edwards v State*, 62 Fla. 40, 56 So. 401; *Park v Candler*, 113 Ga. 647, 39 S.E. 89; *Continental Life Ins. Co. v Hattabaugh*, 21 Idaho 285, 121 Pac. 81; *Hubbard v Dunne*, 276 Ill. 598, 115 N.E. 210; *Knight v Clay County*, 179 Ind. 568, 101 N.E. 1010; *State v Hutchinson Ice Cream Co.*, 168 Iowa 1, 147 N.W. 195; *In re Burnette*, 73 Kan. 609, 85 Pac. 575; *Wendt v Berry*, 154 Ky. 587, 157 S.W. 1115; *State v Schoefield*, 136 La. 702, 67 So. 557; *Dirken v Great Northern Paper Co.*, 110 Me. 374, 86 Atl. 320; *Ruehl v State (Md.)* 100 Atl. 75; *Common. v Libbey*, 216 Mass. 356, 103 N.E. 923; *Price v Oakfield*, 182 Mich. 216, 148 N.W. 438; *Mathison v Minneapolis Street R. Co.*, 12 Minn. 286, 148 N.W. 71; *State Univ. v Waugh*, 105 Miss. 623, 62 So. 827; *State v Merchants Exch. (Mo.)* 190 S.W. 903; *State v Cunningham*, 39 Mont. 197, 103 Pac. 497; *Gaster v Gaster*, 92 Neb. 6, 137 N.W. 900; *Turner v Fogg (Nev.)* 159 Pac. 56; *State v Prince*, 77 N.H. 581, 94 Atl. 966; *State v DeLorenzo*, 81 N.J.L. 613, 79 Atl. 839; *Rapp v Venable*, 15 N.M. 509, 110 Pac. 834; *Willis v Rochester Elec. R. Co.*, 219 N.Y. 427, 114 N.E. 851; *Smith v Wilkins*, 164 N.C. 135, 80 S.E. 168; *State v Taylor*, 33 N.D. 76, 156 N.W. 561; *State v Jones*, 51 Ohio St. 492, 37 N.E. 945; *State v Cease*, 28 Okla. 271, 114 Pac. 251; *Libby v Olcott*, 66 Ore. 124, 134 Pac. 13; *Winston v Moore*, 244 Pa. 447, 91 Atl. 520; *Sayles v Foley*, 38 R.I. 484, 96 Atl. 340; *Massey v Glenn (S.C.)* 90 S.E. 321; *Schaller v Canistota Grain Co.*, 32 S.D. 15, 141 N.W. 993; *Heiskell v Knoxville*, 136 Tenn. 376, 189 S.W. 857; *Ashford v Goodwin*, 103 Tex. 491, 131 S.W. 535; *Park v Rives*, 40 Utah 47, 119 Pac. 1034; *State v Clement National Bank*, 84 Vt. 167, 78 Atl. 944; *Ex parte Settle*, 114 Va. 715, 77 S.E. 496; *Litchman v Shannon*, 90 Wash. 186, 155 Pac. 783. This is also true with reference to laws enacted by the initiative process. *Common. v*

§ 139. **Conclusiveness of the Enrolled Bill.**—As we have previously stated,²⁰ according to some jurisdictions,²¹ the enrolled bill is conclusive of the law and cannot be impeached by resort to the legislative journals.²² Where this rule is applied, the courts will not go beyond the enrolled bill to see whether a statute has been regularly enacted.²³ In other words, the enrolled act imports absolute verity. Hence, it cannot be shown that the bill was not introduced within the time limit,²⁴ nor properly read,²⁵ nor a roll call taken on final passage,²⁶ nor passed by the required vote,²⁷ nor passed before adjournment,²⁸ nor timely presented to the governor for his veto.²⁹ In fact, at least one case goes so far as to hold the statute valid, even though it was not enrolled, signed by the legislative officers, presented to the governor, nor signed by him within

²⁰ See § 46, supra.

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²² *State ex rel Coleman v Lewis*, 181 S.C. 10, 186 S.E. 625.

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²⁴ *State v Jones*, 6 Wash. 452, 34 Pac. 201, 23 L.R.A. 340.

²⁵ See note, 40 L.R.A. (N.S.) 19.

²⁶ *Thompson v Huston (Okla.)* 39 Pac. (2) 524.

²⁷ *Yolo County v Colgan*, 132 Calif. 265, 64 Pac. 403.

²⁸ *Western Union Tel. Co. v Taggart*, 141 Ind. 281, 40 N.E. 1051, 60 L.R.A.

²⁹ *State ex rel Landes v Thompson (Fla.)* 170 So. 464.

have been observed,¹⁵ or whether the legislature has conformed to directions contained in other statutes regarding the enactment of laws.¹⁶ The court will merely ascertain whether the statute has been enacted in compliance with the provisions of the constitution.¹⁷ But there is a presumption that such provisions have been complied with by the legislature, both as to substance as well as to form and enactment.¹⁸ Such presumptions are, however, but *prima facie*,¹⁹ and hence rebuttable.

¹⁵ *St. Louis, etc., R. Co. v Gill*, 54 Ark. 101, 15 S.W. 19, 11 L.R.A. 452, aff. 156 U.S. 649, 39 L.Ed. 567, 15 S.Ct. 484; *Hunt v Wright*, 70 Miss. 298, 11 So. 608; *In re Ryan*, 80 Wis. 414, 50 N.W. 187.

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¹⁹ See cases under note 18, *supra*.

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²⁸ *Western Union Tel. Co. v Taggart*, 141 Ind. 281, 40 N.E. 1051, 60 L.R.A.

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²⁹ *State ex rel Landes v Thompson* (Fla.) 170 So. 464.

the legislative session, as certified to on the face of the enrolled bill.³⁰

This rule rests upon the principle that the legislature is a separate branch of the government,³¹ co-equal with the judiciary,³² and that to allow resort to other evidence would create considerable confusion, and uncertainty, in the administration of the law involved.³³ The rule is sometimes also said to be based upon convenience,³⁴ since the determination of the validity of a law must be made from the law itself without resort to the journals or other extrinsic evidence. This doctrine of convenience constitutes a strong argument for the rule that the enrolled bill is conclusive. The rule has also been justified on the grounds of public policy.

³⁰ *State ex rel Landes v Thompson* (Fla.) 170 So. 464.

³¹ *Field v Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; *Twin City Nat. Bank v Nebecker*, 167 U.S. 196, 42 L.Ed. 134, 17 S.Ct. 766; *Allen v State*, 14 Ariz. 458, 130 Pac. 1114; *Harwood v Wentworth*, 4 Ariz. 378, 42 Pac. 1025; *Taylor v Cole*, 201 Calif. 327, 257 Pac. 40; *Bachlott v Buie*, 158 Ga. 705, 124 S.E. 339; *France v Mulock* (Iowa) 235 N.W. 58; *Golightly v Bailey*, 218 Ky. 794, 292 S.W. 320; *Kelley v Marron*, 21 N.M. 239, 153 Pac. 262. And note especially *State ex rel Reed v Jones*, 6 Wash. 452, 463, 34 Pac. 201, 23 L.R.A. 340: "Upon principle, then, in view of the division into departments under our form of government, each of equal authority, one department cannot rightfully go behind the final record certified to it or to the public from either of the other departments; and the judicial department is no more justified in going behind the final act of the legislature to see if it has obeyed every mandatory provision of the constitution than has the legislature to go back of the final record made by the courts to see whether or not they have complied with all constitutional requirements." Also see *Notes* in 7 Harv. L.Rev. 186 (1893), 10 Harv. L.Rev. 380 (1897) 25 Harv. L.Rev. 480 (1911), 34 Harv. L.Rev. 93, and *Corliss, Can the Judiciary Determine Whether a Statute Exists* (1888) 37 Albany L.J. 428.

³² *Ibid.*

³³ *Sherman v Story*, 30 Calif. 253; *Weeks v Smith*, 81 Me. 538, 18 Atl. 325; *Pacific R. Co. v Price*, 23 Mo. 353; *Pangborn v Young*, 32 N.J.L. 29; *Williamson v Richards*, 158 S.C. 534, 155 S.E. 890. And note the following language in *Sherman v Story*, 30 Calif. 253, 275: "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parol evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable." Legislative journals are more likely to contain errors than the certificate of the presiding officers are unlikely to be untrue. *Weeks v Smith*, 81 Me. 538, 18 Atl. 325.

³⁴ See *State v Lynch*, 169 Iowa 148, 151 N.W. 81.

No case will provide a better discussion of the foundation for the journal entry rule than *Field v Clark*,³⁵ which involved a congressional enactment:

“The contention of the appellant is, that this enrolled act, in the custody of the Secretary of State, and appearing, upon its face, to have become a law in the mode prescribed by the constitution, is to be deemed an absolute nullity, in all its parts, because—such is the allegation—it is shown by the congressional record of proceedings, reports of committees of each house, reports of committees of conference, and other papers printed by the authority of congress, and having reference to house bill 9416, that a section of the bill, as it finally passed, was not in the bill authenticated by the signatures of the presiding officers of the respective houses of congress, and approved by the president.

The argument, in behalf of the appellants, is, that a bill, signed by the Speaker of the House of Representatives and by the president of the Senate, presented to and approved by the President of the United States, and delivered by the latter to the Secretary of State, as an act passed by Congress, does not become a law of the United States if it had not in fact been passed by Congress. In view of the express requirements of the Constitution the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the House and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.

But this concession of the correctness of the general principle for which the appellants contend does not determine the precise question before the court; for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress. This question is now presented for the first time to this court. It has received, as its importance required that it should receive, the most deliberate consideration. . . .

The clause of the Constitution upon which the appellants rest their contention that the act in question was never passed by Congress is the one declaring that “each house shall keep a journal of its proceedings, and from time to time publish the

³⁵ *Field v Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294. Accord: *Weeks v Smith*, 81 Me. 538, 18 Atl. 325; *Pangborn v Young*, 32 N.J.L. 29, with reference to public policy.

same, except such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal." Art. 1, § 5. It was assumed in argument that the object of this clause was to make the journal the best, if not conclusive, evidence upon the issue as to whether a bill was, in fact, passed by the two houses of Congress. But the words do not require such interpretation. On the contrary, as Mr. Justice Story has well said, "the object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main sources, by plotting and devising measures in secrecy. The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. * * * So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion." 1 Story, Const., §§ 840, 841.

In regard to certain matters, the Constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of that instrument, either expressly or by necessary implication prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an

enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills, authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed Congress. But the contention is, that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the President. It is said that, under any other view, it becomes possible for the Speaker of the House of Representatives and the President of the Senate to impose upon the people as a law a bill that was never passed by Congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the Constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of State, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the constitution, would be far

less than those that would certainly result from a rule making the validity of Congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

The views we have expressed are supported by numerous adjudications in this country, to some of which it is well to refer. In *Pangborn v Young*, 32 N. J. Law 29, 37, the question arose as to the relative value, as evidence of the passage of a bill, of the journals of the respective houses of the legislature and the enrolled act authenticated by the signatures of the speakers of the two houses and by the approval of the governor. The bill there in question, it was alleged, originated in the house and was amended in the senate, but, as presented to and approved by the governor, did not contain all the amendments made in the senate. Referring to the provision in the constitution of New Jersey, requiring each house of the legislature to keep a journal of its proceedings—which provision is in almost the same words as the above clause quoted from the Federal Constitution—the court, speaking by Chief Justice Beasley, said that it was impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of the legislative action to the constitutional provisions relating to the enactment of laws. In the nature of things, it was observed, these journals must have been constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly. The Chief Justice said: “Can any one deny that, if the laws of the State are to tested by a comparison with these journals, so imperfect, so unauthenticated, that the stability of all written law shall be shaken to its very foundation? Certainly, no person can venture to say that many of our statutes, perhaps some of the oldest and most important, those which affect large classes of persons or on which great interests depend, will not be found defective, even in constitutional particulars, if judged by this criterion. * * * In addition to these considerations, in judging of consequences, we are to remember the danger under the prevalence of such a doctrine to be apprehended from the intentional corruption of evidences of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals; for it is obvious that any law can be invalidated by the interpolation of a few lines or the obliteration of one name and the substitution of another in its stead. I cannot consent to expose the state legislation to the hazards of such probable error or facile fraud. The doctrine contended for on the part of the evidence has no found-

dation in my estimation, on any consideration of public policy.” The conclusion was, that upon grounds of public policy, as well as upon the ancient and well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislature and the approval of the governor, and found in the custody of the Secretary of State, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode. . . .

A case very much in point is *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825. The validity of a certain act was there questioned on the ground that, although signed by the presiding officers of the two houses of the legislature, and approved by the governor, it was not law, because it appeared from the journals of those bodies, kept in pursuance of the constitution, that the original bill, having passed the house, was sent to the senate, which passed it with numerous amendments, in all of which the house concurred; but the bill, as approved by the governor did not contain certain amendments which bore directly upon the issues in the case before the court. The court, in a vigorous opinion delivered by Mr. Justice Campbell, held that the enrolled act, signed by the President of the Senate, and the Speaker of the House of Representatives and the governor is the sole exposition of its contents, and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions. After a careful analysis of the adjudged cases the court said: “Every other view subordinates the legislature and disregards that co-equal position in our system of the three departments of government. If the validity of every act published as law is to be tested by examining its history, as shown by the journals of the two houses of the legislature, there will be an amount of litigation, difficulty and painful uncertainty appalling in its contemplation, and multiplying a hundredfold the alleged uncertainty of the law. Every suit before every court, where the validity of a statute may be called in question as affecting the right of a litigant, will be in the nature of an appeal or writ of error or bill of review for errors apparent on the face of the legislative records, and the journals must be explored to determine if some contradiction does not exist between the journals and the bill signed by the presiding officers of the two houses. What is the law to be declared by the court? It must inform itself as best it can what is the law. If it may go beyond the enrolled and signed bill and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it, for he has as

much right, and is as much bound to preserve the constitution and declare and apply the law as any other court, and we will have the spectacle of examination of journals by justices of the peace, and statutes declared to be not law as the result of their journalistic history, and the Circuit and Chancery Courts will be constantly engaged in like manner, and this court, on appeal, have often to try the correctness of the determination of the court below, as to the conclusions to be drawn from the legislative journals on the inquiry as to the validity of the statutes thus tested. . . .

In *Weeks v Smith*, 81 Me. 538, 18 Atl. 327, it was said: "Legislative journals are made amid the confusion of a dispatch of business, and, therefore, much more likely to contain errors than the certificates of the presiding officers are to be untrue. Moreover, public policy requires that the enrolled statutes of our state, fair upon their faces, should not be put in question after the public have given faith to their validity. No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate and approved by the governor, is a statute or not. The enrolled act, if a public law, and the original, if a private act, have always been held in England to be records of the highest order, and, if they carry no 'death wounds' in themselves, to be absolute verity, and of themselves conclusive."

As will appear from the succeeding section, some courts apply the rule that the enrolled act imports absolute verity, in a modified form. According to this modification of the rule, and as it is typically expressed in *In re Vanderberg* (28 Kan. 243):

"If we accept the enrolled statute embodying the act now challenged by the petitioner as conclusive evidence of the regularity of the passage of the act and of its validity—as in many of the states the courts decide must be done—we would not be at liberty to inquire into or dispute the enactment or contents of this statute. . . . In *State v Francis*, 26 Kan. 724, it is also stated that "in this state, where each house is required by the constitution to keep and publish a journal of its proceedings, we cannot wholly ignore such journals as evidence, and therefore, when there can be no room for doubt, from the evidence furnished by such journals, that the statute was not passed by a constitutional majority of the members of either house, then the courts may declare that the supposed statute was not legally passed, and is invalid."

This language of the opinion is qualified, however, as follows:

“The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act and of its validity, and it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty of the courts to hold that the enrolled statute is valid.”

§ 140. **The Journal Entry Rule.**—As has also been previously stated,³⁶ some jurisdictions³⁷ do not apply the rule that a duly authenticated and enrolled bill imports absolute verity but allow the courts to look beyond the enrolled bill to determine whether the legislature in its passage has met all constitutional requirements. There is, however, even here, a presumption that the law was legally enacted,³⁸ although the legislative journals may be introduced in evidence to overturn the presumption.³⁹ If the journals do not affirmatively show a violation of the constitution, the presumption

³⁶ § 139, *supra*.

³⁷ *Bachelor v State*, 216 Ala. 356, 113 So. 67; *Connor v Blackwood*, 176 Ark. 139, 2 S.W. (2) 44; *Gallup v Rule*, 81 Colo. 335, 255 Pac. 463; *Rash v Allen*, 24 Del. 444, 76 Atl. 370; *State v Palmetto*, 99 Fla. 401, 128 So. 613; *Gem Irr. Dist. v Gallet*, 43 Idaho 519, 253 Pac. 128; *People v Illinois Dental Board*, 278 Ill. 144, 115 N.E. 852; *State v Salina*, 108 Kan. 271, 194 Pac. 931; *McClellan v Stein*, 229 Mich. 203, 201 N.W. 209; *Jaques v Pike Rapids Power Co.*, 172 Minn. 306, 215 N.W. 221; *State v Adams*, 323 Mo. 729, 19 S.W. (2) 671; *State v Cox*, 105 Neb. 75, 178 N.W. 913; *In re Opinion of Justices*, 76 N.H. 601, 81 Atl. 170; *State v Steen*, 55 N.D. 239, 212 N.W. 843; *State v Boyer*, 84 Ore. 513, 165 Pac. 587; *O'Neil v Demers*, 44 R.I. 504, 118 Atl. 677; *State v Collier*, 160 Tenn. 403, 23 S.W. (2) 897; *Ritchie v Richards*, 14 Utah 345, 47 Pac. 670; *Mercalle v Down*, 64 Wis. 323, 25 N.W. 412; *State v Smart*, 22 Wyo. 154, 136 Pac. 452.

³⁸ *Ibid*. “The enrolled statute on file in the office of the secretary of state is very strong presumptive evidence of the regularity of the passage of the statute, and of its validity; and it is conclusive evidence of such regularity and validity, unless the journals of the legislature clearly, conclusively and beyond all doubt, show that the act was not passed regularly or legally.” *State ex rel v Francis*, 26 Kan. 724. This is true notwithstanding that it may appear from extrinsic evidence that a mistake was made in enrolling. *In re Division of Howard County*, 15 Kan. 194.

³⁹ See cases under note 37, *supra*. Also see *State v Adams*, 232 Mo. 729, 19 S.W. (2) 671.

is considered conclusive,⁴⁰ as mere silence on the part of the journals is not considered sufficient to overcome the presumption of compliance,⁴¹ unless the silence pertains to a matter required by the constitution to be shown by the journals.⁴² Accordingly, it will not be presumed from the mere silence of the legislative journals that the legislature exceeded its authority or disregarded constitutional requirements in passing a statute, unless the constitution expressly requires the journals to show the action taken.⁴³

This variation may be due largely, if not entirely, to a difference in the language of the various constitutions, as the court points out in certain cases cited in *Field v Clark*:⁴⁴

“There are cases in other courts which proceed upon opposite grounds from those we have indicated as proper. But it will be found, upon examination, that many of them rested

⁴⁰ *Henderson County v Travelers Ins. Co.*, 128 Fed. 817, 63 C.C.A. 467; *Ames v Union Pac. R. Co.*, 64 Fed. 168, aff. 169 U.S. 466, 42 L.Ed. 819, 18 S.Ct. 418; *Bachelor v State*, 216 Ala. 356, 113 So. 67; *Connor v Blackwood*, 176 Ark. 139, 2 S.W. (2) 44; *Terr. v O'Connor*, 5 Dak. 397, 41 N.W. 746, 3 L.R.A. 355; *Clendaniel v Conrad*, 26 Dela. 549, 83 Atl. 1036; *West v State*, 50 Fla. 154, 39 So. 412; *In re Drainage Dist.*, 26 Idaho 311, 143 Pac. 299; *Neiberger v McCullough*, 253 Ill. 312, 97 N.E. 660; *State v Salina*, 108 Kan. 271, 194 Pac. 931; *Ridgely v City of Baltimore*, 119 Md. 567, 87 Atl. 909; *State v Wagner*, 130 Minn. 424, 153 N.W. 749; *State v Dean*, 84 Neb. 344, 121 N.W. 719; *State ex rel Loseke v Fricke (Neb.)* 254 N.W. 409; *Wrede v Richardson*, 5 Ohio N.P.N.S. 127; *Johnson v Grady County*, 50 Okla. 188, 150 Pac. 497; *State v Collier*, 160 Tenn. 403, 23 S.W. (2) 897; *Anderson v Bowen*, 78 W.Va. 559, 89 S.E. 677; *State v Smart*, 22 Wyo. 154, 136 Pac. 452. And see *Smith v Thompson*, 219 Iowa 888, 258 N.W. 190, that a legislative bill, appearing on its face to violate constitutional provisions, may be attacked as invalid.

⁴¹ *Pelt v Payne*, 90 Ark. 600, 30 S.W. 426; *People v Dunn*, 80 Calif. 211, 22 Pac. 140; *Adams v Clark*, 36 Colo. 65, 85 Pac. 642; *In re Drainage Dist.*, 26 Idaho 311, 143 Pac. 299; *Hollingsworth v Thompson*, 45 La. Ann. 222, 12 So. 1; *Portland v Yick*, 44 Ore. 439; *State v Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L.R.A. 195; and *Note*, 11 L.R.A. 492. See also *Clendaniel v Conrad*, 3 Boyce (Dela.) 549, 83 Atl. 1036, that in case of doubt, the presumption continues. And see *State ex rel Cunningham v Davis (Fla.)* 166 So. 289.

⁴² *Cohn v Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L.R.A. 74; *Lynch v Hutchinson*, 219 Ill. 193, 76 N.E. 370; *State v Mickey*, 73 Neb. 281, 102 N.W. 679; *Union Bank v Oxford*, 119 N.C. 214, 25 S.E. 966; *George Bollin Co. v North Platte Val. Irr. Co.*, 19 Wyo. 542, 121 Pac. 22.

⁴³ *Garrett Transfer & Storage Co. v Pfast (Idaho)* 33 Pac. (2) 743.

⁴⁴ *Field v Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294. And see *People v Starne*, 35 Ill. 121; *Carr v Coke*, 116 N.C. 223, 22 S.E. 16, 28 L.R.A. 737, and *In re Vanderberg*, 28 Kan. 243.

upon constitutional or statutory provisions of a peculiar character, which, expressly, or by necessary implication required or authorized the court to go behind the enrolled act when the question was, whether the act, as authenticated and deposited in the proper office, was duly passed by the legislature. This is particularly the case in reference to the decisions in Illinois. (Cases cited.) In the last named case it was said: "Were it not for the somewhat peculiar provision of our constitution, which requires that all bills before they can become laws shall be read three several times in each house, and shall be passed by a vote of a majority of all the members-elect, a bill thus signed and approved would be conclusive of its validity and binding force as law. * * * According to the theory of our legislation, when a bill has become a law, there must be a record evidence of every material requirement, from its introduction until it becomes a law. And this evidence is found upon the journals of the two houses." But the court added: "We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect."

Moreover, the rule that the enrolled bill does not import absolute verity, is also sought to be justified upon the grounds of public policy,⁴⁵ and because they are official records to the same extent as is the enrolled act.⁴⁶ Consequently, the courts must examine them in order to ascertain the validity of any enactment. It should be noted, however, that some jurisdictions are not consistent in the application of the journal entry rule or vice versa. So far as some matters are concerned, the enrolled act is considered conclusive⁴⁷ but

⁴⁵ Rice v Lonoke-Cabot Road Dist., 142 Ark. 454, 221 S.W. 179; Berry v Baltimore R. Co., 41 Md. 462; Rode v Phelps, 80 Mich. 598.

⁴⁶ Moody v State, 48 Ala. 115; Chicot v Davies, 40 Ark. 211; Amos v Gunn, 84 Fla. 285, 94 So. 615; State v Andrews, 64 Kan. 474, 67 Pac. 870; Legg v Annapolis, 42 Md. 203; People v Mahaney, 13 Mich. 481; State v Hastings, 24 Minn. 28; State v McLelland, 18 Neb. 243; In re Opinion of Justices, 35 N.H. 580; Osburn v Staley, 5 W.Va. 85.

⁴⁷ State v Wheeler, 172 Ind. 578, 89 N.E. 1; Annapolis v Harwood, 32 Md. 471; State v Moulton, 57 Mont. 414, 189 Pac. 59; Mason v Cranbury Township, 68 N.J.L. 149, 52 Atl. 568; People v Devlin, 33 N.Y. 269; Brown v Stewart, 134 N.C. 357, 46 S.E. 741; Ritzman v Campbell, 93 Ohio St. 246, 112 N.E. 591; Western Union Tel. Co. v Hankins, 104 Okla. 111, 230 Pac. 857; Teem v State, 79 Tex. Cr. 285, 183 S.W. 1144; Lusher v Scites, 4 W.Va. 11.

as to other matters, it will be subject to impeachment.⁴⁸ This inconsistency creates considerable confusion in the law, with little, if any, compensating advantages.⁴⁹ Nevertheless in determining whether constitutional requirements have been met, if the legislative journals may be examined, they must be considered as a whole.⁵⁰

§ 141. **Sufficiency of Journal Entries.**—Occasionally, the validity of a statute will depend upon the sufficiency of the journal entry. Obviously, if the entry is insufficient, the situation is the same as if no entry whatsoever was made. However, entries written with erroneous grammar,⁵¹ or designating the bill by the wrong number,⁵² or entering the ayes and the nays in the wrong places,⁵³ or omitting the christian names of the legislators,⁵⁴ have been con-

⁴⁸ *Cordell v State*, 22 Ind. 1; *Ridgeley v City of Baltimore*, 119 Md. 567, 87 Atl. 909; *Barth v Pock*, 51 Mont. 418, 155 Pac. 282; *Ex parte Hague* (N.J. Ch.) 144 Atl. 546, aff'd 145 Atl. 618; *In re Stickney*, 185 N.Y. 107, 77 N.E. 993; *New Hanover County v DeRosset*, 129 N.C. 275, 40 S.E. 43; *State v Price*, 8 Ohio St. 246; *Western Union Tel. Co. v Hankins*, 104 Okla. 111, 230 Pac. 857; *Anderson v Bowen*, 78 W.Va. 559, 89 S.E. 677, and see *State ex rel Adams v Lee* (Fla.) 166 So. 249, 166 So. 262, that the enactment of a law is to be determined solely by the official journals of the legislature so long as they are fair on their face and have not been impeached. Also see *Smith v Thompson*, 219 Iowa 888, 258 N.W. 190, that while the enrolled bill was conclusive as to the text of the bill, it was not conclusive as to the enactment and that a bill might be impeached if it be shown by records which the constitution required to be kept, that some mandatory provision of the constitution had not been complied with in its passage. Also note the following quotation from *Field v Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294: "But referring now only to matters which the Constitution does not require to be entered on the journals, it is clear that this is not a statutory declaration that the journals are the highest evidence of the facts stated in them, or complete evidence of all that occurs in the progress of business in the respective houses."

⁴⁹ *Legislative Journals as Evidence of Due Enactment*, 22 Iowa L.Rev. 164 (1936).

⁵⁰ *State ex rel X-Cel Stores v Lee* (Fla.) 166 So. 568, aff. 116 So. 262.

⁵¹ *Bound v Wisconsin Cent. R. Co.*, 45 Wis. 543.

⁵² *Miesen v Canfield*, 64 Minn. 513, 67 N.W. 632.

⁵³ *Onslow County v Tollman*, 145 Fed. 753, 76 C.C.A. 317.

⁵⁴ *Ibid.*

sidered sufficient.⁵⁵ Moreover, if the errors or omissions are simply clerical, the court may supply the omissions.⁵⁶ But any alteration made after the journal has been filed with the secretary of state is ineffective.⁵⁷

§ 142. Conclusiveness of Journals.—So far as matters which the constitution requires to be entered in the journals of the legislature are concerned, their recital in the journal is conclusive.⁵⁸ They cannot be impeached by parol or extrinsic evidence.⁵⁹ They afford controlling evidence of whether a bill was passed by both houses.⁶⁰ Nor can the journals be contradicted or amplified by loose memoranda made by the clerical officers of the legislature.^{60a} But fraud, error, mistake, or the improper exercise of judgment, existing intrinsically, may be shown according to some authorities,⁶¹

⁵⁵ Also see, in this connection: *Johns v Bradley County Road Dists.*, 142 Ark. 73, 218 S.W. 389; *State v Blitch (Fla.)* 130 So. 444; *Dumas v Bryan*, 35 Idaho 557, 207 Pac. 720; *Conley v Dilley*, 153 Iowa 677, 133 N.W. 730; *People v Illinois Dental Board*, 278 Ill. 144, 115 N.E. 852; *Earnest v Sargent*, 20 N.M. 427, 150 Pac. 1018. And see *Frey v Derens Donnewald Coal Co.*, 271 Ill. 121, 110 N.E. 824.

⁵⁶ *Price v Moundsville*, 43 W.Va. 523, 27 S.E. 218.

⁵⁷ *Montgomery Beer Bottling Works v Gaston*, 126 Ala. 425, 28 So. 497, 51 L.R.A. 396.

⁵⁸ *Parkinson v Johnson*, 160 Calif. 756; *Rash v Allen*, 24 Dela. 444, 76 Atl. 370; *Day v Walker (Neb.)* 247 N.W. 350; *Smith v Thompson*, 219 Iowa 888, 258 N.W. 190.

⁵⁹ *U.S. v Ballin*, 144 U.S. 1, 36 L.Ed. 321, 12 S.Ct. 507; *State v Joseph*, 175 Ala. 579, 57 So. 942; *Andrews v People*, 33 Colo. 193, 79 Pac. 1031; *Rush v Allen*, 24 Dela. 444, 76 Atl. 370; *State v Carley*, 89 Fla. 361, 104 So. 577; *People v Brady*, 262 Ill. 578, 105 N.E. 1; *McCullough v State*, 11 Ind. 424; *Koehler v Hill*, 60 Iowa 543, 14 N.W. 738, 15 N.W. 609; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 19 L.R.A. 519; *Cammack v Harris*, 234 Ky. 846, 29 S.W. (2) 567; *State v Sec. of State*, 43 La. Ann. 590, 9 So. 776; *New Hanover County v Armour*, 135 N.C. 62, 47 S.E. 411; *State v Smith*, 44 Ohio St. 348; *State v Dixie Finance Co.*, 152 Tenn. 306, 278 S.W. 59; *Wise v Bigger*, 79 Va. 269; *White v Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L.R.A. 66. The original journal will prevail over the printed journal. *Mobile County Comm. v State*, 163 Ala. 441, 50 So. 972. And the journals are equally conclusive over officially printed statutes. *Amos v Mosely*, 74 Fla. 555, 77 So. 619; *Ex parte Hague (N.J. Ch.)* 144 Atl. 546, aff. 145 Atl. 618.

⁶⁰ *Hillsborough County v Temple Terrace Assets Co. (Fla.)* 149 So. 473.

^{60a} *State v Joseph*, 175 Ala. 579, 57 So. 942; *People v Leddy*, 53 Colo. 109, 123 Pac. 824.

⁶¹ *State v Secretary of State*, 43 La. Ann. 590, 9 So. 776.

although the weight of authority is to the contrary.⁶² And, of course, if there is a discrepancy between the published act and the journals, the latter are deemed to be conclusive proof of the form and terms of the act as passed.⁶³

§ 143. Miscellaneous Evidence of Legality of Enactment.—As indicated above,⁶⁴ no evidence, except the legislative journals in those jurisdictions where the journal entry rule is applied,⁶⁵ can be introduced in evidence to impeach the enrolled act.⁶⁶ While this is the general rule, numerous cases can be found where the enrolled act has been impeached by other evidence,⁶⁷ as well as supplemented, in order to show that the requirements of the constitution have not been met.⁶⁸ Of course, where the enrolled act is considered con-

⁶² *McCullough v State*, 11 Ind. 424; *In re Howard County*, 15 Kan. 194; *State v Dixie Finance Co.*, 152 Tenn. 306, 278 S.W. 59; *State v Wendler*, 94 Wis. 369, 68 N.W. 759.

⁶³ *State Docks Comm. v State ex rel Jones (Ala.)* 150 So. 537. Similarly where there is a variance between the printed act and the enrolled bill, the latter controls. *Charleston Nat. Bank v Fox (W.Va.)* 194 S.E. 4.

⁶⁴ See *supra*, § 139.

⁶⁵ See *supra*, §§ 139-142.

⁶⁶ *Ames v Union Pac. R. Co.*, 64 Fed. 165, aff. 169 U.S. 466, 42 L.Ed. 819, 18 S.Ct. 418; *Byrd v State*, 212 Ala. 266, 102 So. 223; *Hughes v Felton*, 11 Colo. 489, 19 Pac. 444; *Lee v Tucker*, 130 Ga. 43, 60 S.E. 164; *People v McElroy*, 72 Mich. 446, 40 N.W. 750, 2 L.R.A. 609; *In re Granger*, 56 Neb. 260, 76 N.W. 588; *State v Smith*, 44 Ohio St. 348, 7 N.E. 447, 12 N.E. 829.

⁶⁷ Legislative records: *Helena Water Co. v Helena*, 140 Ark. 597, 216 S.W. 26; *Rice v Lonoke-Cabot Road Improvement Dist.*, 142 Ark. 454, 221 S.W. 179; Engrossed bill: *Hollingsworth v Thompson*, 45 La. Ann. 222, 12 So. 1; *Baltimore Fidelity Warehouse Co. v Canton Lumber Co.*, 118 Md. 135, 84 Atl. 188. Original memoranda constituting material for the bill: *People v Leddy*, 53 Colo. 109, 123 Pac. 824; Memorandum in minute book of the Journal Clerk: *U.S. v Allen*, 36 Fed. 174. Original bill: *Rice v Lonoke-Cabot Road Improvement Dist.*, *supra*; parol evidence, however, does not ever seem competent—either to impeach the journals, or the enrolled act: *Jackson v State*, 131 Ala. 21, 31 So. 380; *Ewing v McGehee*, 169 Ark. 448, 275 S.W. 766; *Amos v Gunn*, 84 Fla. 285, 94 So. 615; *Ridgeley v City of Baltimore*, 119 Md. 567, 87 Atl. 909; *Sackrider v Saginaw County*, 79 Mich. 59, 44 N.W. 165; *State v Swift*, 10 Nev. 176; *Wrede v Richardson*, 77 Ohio St. 182, 82 N.E. 1072.

⁶⁸ *Portland Gold Mining Co. v Duke*, 191 Fed. 692, 113 C.C.A. 316; *State v Frank*, 60 Neb. 327, 83 N.W. 74, affd. 61 Neb. 697, 85 N.W. 956; *Black v Buncombe County*, 129 N.C. 121, 39 S.E. 818. But slips of paper attached by a rubber band to the original bill, were held incompetent. *Frazier v Board of Comrs.*, 194 N.C. 49, 138 S.E. 433.

clusive, consistency would deny the right to introduce evidence for either of these purposes. And where the journal entry rule is applied, permitting recourse to evidence beyond the journals themselves, in a sense, destroys most of the value that such journals have as official documents. The enactment of any statute is consequently opened to the dangers of uncertainty and confusion, and the co-ordinate positions of the judiciary and the legislature are also endangered if not destroyed.⁶⁹

Even resort to the motives of the individual members of the legislature which enacted the law, subject to attack, is generally regarded as an improper method by which to determine the legality of the enactment of a law, as is indicated by the court in *Borough of Freeport v Marks*.⁷⁰

There was no offer to show that the plaintiff was guilty of any fraud or collusion which would affect the good faith of his subscription and payment of money, or its appropriation to the use of the borough, nor was there any evidence of it. The motives of the members of the council, or the influences under which they acted, cannot be brought to nullify an ordinance duly passed in the legal forms of borough legislation, at a meeting regularly convened for the purpose and within the scope of their corporate powers. The assistant burgess being competent to act, the legality of the action of the council cannot be assailed because the friends of the measure, taking advantage of the accidental absence of the chief burgess, chose to assemble and pass the ordinance, if the meeting was duly convened. The legality of the acts of legislative or of corporate bodies cannot be tested by the motives of the individual members, or the adventitious circumstances they may lay hold of to carry their measures, provided they proceed regularly and act within the scope of their powers. If they be regularly convened, if the purpose be lawful and if their acts are passed in due form of law and within the scope of their authority, persons who lend their money on the faith of such acts, or do other lawful things in a just reliance upon their validity, cannot be affected by the secret springs of corporate action, and the public faith cannot be tarnished by the unseen influences surrounding it.

But where the legislative act is tarnished by fraud, undoubtedly where no innocent persons will be injured thereby, it would seem clearly permissible to allow the law to be invalidated by the proof of facts and circumstances showing the fraud involved.

⁶⁹ See *State ex rel Reed v Jones*, 6 Wash. 452, 34 Pac. 201, 23 L.R.A. 340. Also see *The Sunbury v Cooper*, 33 Pa. 278.

⁷⁰ *Borough of Freeport v Marks*, 59 Pa. 253.

CHAPTER XVI

PARTIAL INVALIDITY

§ 144. In General.

§ 145. Statutory Declaration of Effect of Partial Invalidity—Separability Clauses.

§ 146. Partial Invalidity Due to Failure to Properly Express Subject Matter in Title.

§ 144. In General.—Simply because a statute happens to be unconstitutional or invalid in part, does not necessarily mean that the part which is not invalid must also fail,¹ not even though the statute be penal.² It is only where the valid parts are so clearly dependent upon and so inseparably connected with the invalid parts that they cannot be separated without defeating the object of the

¹ *Connolly v Union Sewer Pipe Co.*, 184 U.S. 540, 23 S.Ct. 206, 46 L.Ed. 679; *Cone v Garner*, 175 Ark. 860, 3 S.W. (2) 1; *People v Morgan*, 79 Colo. 307, 245 Pac. 720; *Winter v Barrett*, 352 Dela. 441, 186 N.E. 113; *People v Crowe*, 327 Ill. 106, 158 N.E. 451; *Des Moines v Manhattan Oil Co.*, 193 Iowa 1096, 188 N.W. 921; *Voran v Wright*, 129 Kan. 601, 284 Pac. 807; *People v McMurdy*, 249 Mich. 147, 228 N.W. 723; *Mayes v United Garment Workers*, 320 Mo. 10, 6 S.W. (2) 333; *Logan County v Carnahan*, 66 Neb. 685, 92 N.W. 984, 95 N.W. 812; *People v Knapp*, 230 N.Y. 463, 129 N.E. 202; *Claywell v Road Com'rs.*, 173 N.C. 657, 92 S.E. 481; *State v Ritchie*, 97 Ohio St. 41, 119 N.E. 124; *Richardson v Young*, 122 Tenn. 471, 125 S.W. 664; *Dallas v Love (Tex.)* 23 S.W. (2) 431; *Lorney v Common.*, 145 Va. 825, 133 S.E. 753; *McFarland v Cheyenne (Wyo.)* 42 Pac. (2) 413.

² *State v Bevins*, 210 Iowa 1031, 230 N.W. 865. But some courts refuse to find that general provisions in criminal statutes are severable. *Butts v Merchants Transportation Co.*, 230 U.S. 126, 33 S.Ct. 964; *State ex rel Atty. Gen. v Williams-Echols D. G. Co.*, 178 Ark. 324, 3 S.W. (2) 340; *McFarland v Cheyenne (Wyo.)* 42 Pac. (2) 413.

statute, that they too must fall with those parts which are invalid.³ It is also well to remember that separability is not dependent upon whether the various provisions are contained in the same section, for the division of a statute into sections is purely artificial.⁴ In determining separability, the test is whether the legislature has manifested an intention to deal with a part of the subject matter covered, irrespective of the rest of the subject matter;⁵ if such an intention is manifest, the subject matter is separable.⁶ If the valid parts are complete in themselves and independent of the invalid parts and capable of being executed according to the intention of

³ *Schneider v Duer* (Md.) 184 Atl. 914; *In re Groff*, 21 Neb. 647. Also see cases under note 1, *supra*. And see *Grand Trunk R. Co. v Mich. R. Comm.*, 198 Fed. 1009, aff. 231 U.S. 457, 34 S.Ct. 152, 58 L.Ed. 310, and *International, etc., R. Co. v Anderson County* (Tex.) 174 S.W. 305, aff. 246 U.S. 424, 38 S.Ct. 370, 62 L.Ed. 807, where the body of the statute was held valid, although the penalty provisions were invalid. But a more difficult problem is presented in cases of general provisions, inseparable in terms, but susceptible of application in different fact situations. Such provisions have been, in some instances, held separable. *W. & J. Sloane v Common.*, 263 Mass. 529, 149 N.E. 407 (domestic and foreign corporations); *Bowman v Continental Oil Co.*, 256 U.S. 642, 41 S.Ct. 606 (tax on inter and intra-state commerce). Also see note 1, *supra*, and the note in 29 *Columbia Law Rev.* 1140 (1929).

⁴ *Common. v Hitchings* (Mass.) 5 Gray 482.

⁵ *City of Denver v Lynch* (Colo.) 18 Pac. (2) 907; *People v Gould*, 345 Ill. 238, 187 N.E. 133; *State v Kassay*, 126 Ohio St. 177, 184 N.E. 521; *Billing-sley v Gulf, etc., R. Co.*, 122 Okla. 181, 253 Pac. 103.

⁶ *Chicago, etc., R. Co. v Minneapolis*, 238 Fed. 384. A statute is severable if after an invalid portion has been stricken out, that which remains is self-sustaining and capable of separate enforcement without regard to the stricken portion. *Rutenberg v Philadelphia*, 329 Pa. 26, 196 Atl. 73. And the severance of the valid part from the invalid portion of a statute does not depend upon the separation by paragraphs or sentences, but on function. *People v Mancuso*, 255 N.Y. 463, 175 N.E. 177, 76 A.L.R. 514. Moreover, an invalid exception to a general provision does not affect the validity of the latter. *Henderson v McMaster*, 104 S.C. 268, 88 S.E. 645. Similarly, a void exception does not invalidate the general provisions, unless all the provisions are so related that the legislature would not have enacted the law without the proviso. *Ex parte Hennessy* (Calif.) 273 Pac. 826. But a void exception or proviso whose elimination operates to give the remainder of the act a broader scope as to subject or territory than was intended by the legislature, will invalidate the whole act. *Webb v Adams*, 180 Ark. 713, 23 S.W. (2) 617.

the legislature, they must be sustained by the court,⁷ notwithstanding partial invalidity.⁸ The invalid parts, however, may be dropped only where the part which is retained is fully operative as a law.⁹ And where the invalid and the valid parts are independent and essentially and inseparably connected in substance, there is a strong presumption that the legislature would not have enacted one part without the other, and the entire statute will fall.¹⁰ A similar result

⁷ *Weller v People*, 268 U.S. 319, 45 S.Ct. 556, 69 L.Ed. 978; *Georgia Power Co. v Tenn. Valley Authority*, 14 Fed. Supp. 673; *Alabam's Freight Co. v Hunt*, 29 Ariz. 419, 242 Pac. 658; *Gwynn v Hardee*, 92 Fla. 543, 110 So. 343; *Jackson v Blair*, 298 Ill. 605, 132 N.E. 221; *State v Barrett*, 172 Ind. 169, 87 N.E. 7; *State v Wrenn*, 194 Iowa 552, 188 N.W. 697; *Daly v Morgan*, 69 Md. 460, 16 Atl. 287, 1 L.R.A. 757; *State v Lollis (Mo.)* 33 S.W. (2) 98; *Schwartz v Gallup*, 22 N.M. 521, 165 Pac. 345; *Brunswick v Mecklenberg County*, 181 N.C. 386, 107 S.E. 317; *State v Conn*, 116 Ohio St. 127, 156 N.E. 114; *State v Langworthy*, 55 Ore. 303, 104 Pac. 242, 106 Pac. 336; *Higgins v Glenn*, 65 Utah 406, 237 Pac. 513; *Sargent v Rutland R. Co.*, 86 Vt. 328, 85 Atl. 654; *Clay v Brown*, 131 Wash. 679, 231 Pac. 166; *State v Sawyer County*, 140 Wis. 634, 123 N.W. 248. This is true even where the valid and invalid parts appear in the same section, *Berea College v Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81, *Soper v Lawrence Bros. Co.*, 98 Me. 268, 56 Atl. 908, aff. 201 U.S. 359, 26 S.Ct. 473, 50 L.Ed. 788; *Gross v Gentry County*, 320 Mo. 332, 8 S.W. (2) 887, and regardless of the reason for the invalidity. *People v LaSalle St. Trust Bank*, 269 Ill. 518, 110 N.E. 38; *State v Green*, 36 Fla. 154, 18 So. 334. And see *State ex rel Karbe v Bader (Mo.)* 78 S.W. (2) 835, where an emergency clause was invalid but the rest of the act nevertheless became operative.

⁸ *Springer v State ex rel (Ala.)* 157 So. 219.

⁹ *In re American States P. S. Co.*, 12 Fed. Supp. 667, mod. 81 Fed. (2) 721, cert. den. 56 S.Ct. 670; *State v Sande*, 205 Wis. 495, 238 N.W. 504.

¹⁰ "If (the parts) are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional and connected, must fall with them." *Warren v Mayor (Mass.)* 2 Gray 84. Also see *Butts v Merchants Transportation Co.*, 230 U.S. 126, 33 S.Ct. 964; *Union Pac. R. Co. v Atchison, etc., R. Co.*, 28 Kan. 453; *Hinze v People*, 92 Ill. 406; *Great United Mut. Ben. Ass'n v Palmer*, 258 Ill. 276, 193 N.E. 146; *People v McMurdy*, 249 Mich. 147, 228 N.W. 723; *Lodven v Warren*, 146 Minn. 181, 178 N.W. 741; *State v Gordon*, 236 Mo. 142, 139 S.W. 403; *Smith v Wilkins*, 164 N.C. 135, 80 S.E. 168; *Morrow v Wipf*, 22 S.D. 146, 115 N.W. 1121; *Bertram v Common.*, 108 Va. 902, 62 S.E. 969; *In re Bolens*, 148 Wis. 456, 135 N.W. 164. This also seems true even if the statute contained a saving clause. *Hannabass v Maryland Cas. Co. (Va.)* 194 S.E. 808.

will occur where all the provisions of an act are connected as parts of a single scheme. In such a case, if the main object or purpose is invalid, those provisions which are incidental will also fall.¹¹ But in any instance, there is a presumption that the legislature intended for the statute or act to be effective in its entirety,¹² unless something in the act indicates to the contrary.¹³

In order to ascertain the intention of the legislature, the court may examine the entire statute, including the invalid as well as the valid portions,¹⁴ and resort to the usual principles of statutory construction.¹⁵ But where it is impossible to determine what part of a statute was intended by the legislature to be operative when certain of its provisions have been held invalid, the whole statute will fall.¹⁶

§ 145. Statutory Declaration of Effect of Partial Invalidity—Separability Clauses.—It is not an uncommon practice for the legislature to insert in an act an express provision that the invalidity or

¹¹ *Bendix v Beman*, 14 Fed. Supp. 58; *Jones v Jones*, 104 N.Y. 234; *Darby v Wilmington*, 76 N.C. 133; *Black v Trower*, 79 Va. 123; *Dells v Kennedy*, 49 Wis. 555; *State v Bancroft*, 148 Wis. 124, 134 N.W. 330.

¹² *Williams v Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, aff. 24 Fed. (2) 455; *Riccio v Hoboken*, 69 N.J.L. 649, 55 Atl. 1109, 63 L.R.A. 485. A separability clause in a statute, however, will give rise to a presumption of divisibility. *Railroad Retirement Board v Alton R. Co. (U.S.)* 55 S.Ct. 758. But it is merely an aid to judicial interpretation and not conclusive of the legislative intent. *First Trust Co. v Smith (Neb.)* 277 N.W. 762.

¹³ *Railroad Retirement Board v Alton R. Co. (U.S.)* 55 S.Ct. 758; *McFarland v Cheyenne (Wyo.)* 42 Pac. (2) 413. Also see *Rosenblum v Griffin (N.H.)* 197 Atl. 701, that the legislature's more probable intention that the invalid part should not invalidate the statute entirely, if the valid part may be reasonably saved, should be adopted.

¹⁴ *Neutzel v Williams*, 191 Ky. 351, 230 S.W. 942.

¹⁵ See *Dorchy v Kansas*, 264 U.S. 286, 44 S.Ct. 323, 68 L.Ed. 686; *Greene County v Ludy*, 263 Mo. 77, 172 S.W. 376; *People v Knapp*, 230 N.Y. 48, 129 N.E. 202. And in determining the divisibility of an enactment, the rule of strict construction has been held applicable. *People v Mancusco*, 255 N.Y. 463, 175 N.E. 177. But the rule of liberal construction has also been applied. *Mensi v Walker*, 160 Tenn. 468, 26 S.W. (2) 132, ap. dis. 51 S.Ct. 363. The application of the former rule in criminal cases would seem clearly proper. *Weems v U.S.*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793; *State v Bevins*, 210 Iowa 1031, 230 N.W. 865, ap. dis. 51 S.Ct. 216; *Wynehamer v People*, 13 N.Y. 378; *Gage v State*, 1 Ohio Cir.Ct. n.s. 221. Also see *Baldwin v Franks*, 120 U.S. 678.

¹⁶ *Woolf v Fuller (N.H.)* 174 Atl. 193; *State v Barrett*, 27 Kan. 213.

unconstitutionality of any provision or section thereof, shall in no manner affect the validity or constitutionality of the remainder.¹⁷ While the courts will apply this statutory command as far as possible,¹⁸ it does not alter the rule already discussed and applicable in the absence of any statutory declaration of the effect of partial invalidity,¹⁹ that, if the valid part is inseparably connected with, and dependent upon the invalid part, the whole enactment will fail.²⁰ A separability clause does not clothe the valid parts with immunity from the invalidating effect the law gives to the inseparable blending of the bad with the good.²¹ Such a statutory declaration, however, does reveal or indicate that the legislature intended for the act to be divisible,²² so that there can be no doubt concern-

¹⁷ See *Keller v Potomac Elec. Power Co.*, 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731; *Alsup v State*, 178 Ark. 170, 10 S.W. (2) 9; *State v Howatt*, 107 Kan. 423, 191 Pac. 585; *Wattles v Upjohn*, 211 Mich. 514, 179 N.W. 335; *People v Travis*, 231 N.Y. 339, 132 N.E. 109, 15 A.L.R. 1319; *Bagley Co. v Cameron*, 282 Pa. 84, 127 Atl. 311; *Hines v Foreman (Tex.)* 243 S.W. 479; *Nifges v Thornton*, 119 Wash. 464, 206 Pac. 17; *State v Ross*, 31 Wyo. 500, 228 Pac. 636. In California, the legislature has added to the prevailing separability clause, the declaration of its intention to enact the residue of the statute, even though a portion is held invalid. *Motor Vehicle Transportation License Act*, St. 1923, p. 706, § 11.

¹⁸ *Marshall v Holland*, 168 Ark. 449, 270 S.W. 609; *Common. v Haldeman*, 288 Pa. 81, 135 Atl. 651; *State v Clausen*, 65 Wash. 156, 117 Pac. 1114.

¹⁹ See § 144, *supra*.

²⁰ *Springfield Gas, etc., Co. v Springfield*, 292 Ill. 236, 126 N.E. 739, 18 A.L.R. 929, *aff.* 257 U.S. 66, 42 S.Ct. 24, 66 L.Ed. 131; *Daniel v Larsen*, 157 Tenn. 690, 12 S.W. (2) 386; *State v Bancroft*, 148 Wis. 124, 134 N.W. 330. See also *Lempke v Farmers Grain Co.*, 258 U.S. 50, 42 S.Ct. 244, where the entire act must fall, if the valid portions, independent of those rejected, are incapable of being executed in accordance with the legislative intent. But note *State v Howatt*, 116 Kan. 412, 227 Pac. 752. And in the absence of a saving clause, the whole act must fall, when the express exceptions in a statute are held invalid, inasmuch as the incision of the exception defeats the expressed intent of the legislature. *Connolly v Union Pac. Pipe Co.*, 184 U.S. 540, 23 S.Ct. 206, 46 L.Ed. 679. But, with the incorporation of a separability clause in such a statute, a contrary result will take place. *Bacon Service Corp. v Huss (Calif.)* 248 Pac. 235. *Contra: People v Morgan (Colo.)* 246 Pac. 1024.

²¹ *State v Montgomery*, 177 Ala. 212, 59 So. 294.

²² *State v Montgomery*, 177 Ala. 212, 59 So. 294. It is also entitled to great weight. *State ex rel Wis. v Dammann (Wis.)* 280 N.W. 698.

ing the adoption of any of the provisions, if the legislature had known in advance that a part of the act was, or would be declared invalid.²³ In any event, a presumption of divisibility is created.²⁴ And while statutory provisions of this type are ordinarily entitled to recognition by the court, they cannot be applied where they will produce absurd results.²⁵ Nor will the incorporation of a separability clause in a statute, change the principles of statutory construction adopted by the courts. To hold otherwise would clearly conflict with the doctrine of the separation of powers.

§ 146. Partial Invalidity Due to Failure to Properly Express Subject Matter in Title.—As we have elsewhere stated,²⁶ those provisions of a statute not properly referred to or expressed in the title, will be invalid in many situations. Where this occurs, the question naturally arises concerning the effect of such invalidity upon those provisions which are adequately expressed in the title. The same general principles are applicable here as in those situations where the partial invalidity results from other defects.²⁷ Thus, if all the provisions contained in the statute are so related and inseparably connected that the rejection of the invalid portion leaves the law incomplete, unintelligible or incapable of being executed, the entire enactment will be invalid.²⁸ Conversely, if the valid provisions are independent and complete in themselves, sensible and

²³ *State v Howatt*, 107 Kan. 423, 191 Pac. 585; *Standard Lumber Co. v Pierce*, 112 Ore. 314, 228 Pac. 812.

²⁴ *Williams v Standard Oil Co.*, 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596, aff. 24 Fed. (2) 455; *Bagley Co. v Cameron*, 282 Pa. 84, 127 Atl. 311. Also see *Sage v Baldwin*, 55 Fed. (2) 968.

²⁵ *State ex rel Adams v Lee* (Fla.) 166 So. 249, aff. 166 So. 262. Also see *State v Bancroft*, 148 Wis. 124, 134 N.W. 330. Such a provision is also merely an aid to interpretation and is not an inexorable command. *Utah Power & Light Co. v Pfoest*, 286 U.S. 165, 76 L.Ed. 1038, 52 S.Ct. 548. And note *McPherrin v Smith*, 127 Neb. 424, 255 N.W. 551.

²⁶ See § 96, *supra*.

²⁷ See §§ 144 and 145, *supra*.

²⁸ *Yerby v Cochrane*, 101 Ala. 541, 14 So. 355; *State v Beeling*, 169 La. 785, 126 So. 61; *People v Briggs*, 50 N.Y. 553; *State v Cumberland Club*, 136 Tenn. 84, 118 S.W. 583.

capable of being executed, they will be effective.²⁹ Nevertheless, if the statute reveals that the legislature enacted the valid provisions because of the invalid provisions, the whole act falls.³⁰ And the same is true where it appears that the legislature would not have enacted the statute at all if any of its provisions were to be omitted.³¹ These principles are equally applicable where the statute itself provides that its provisions shall be severable and that in the event any of them shall be unconstitutional, the validity of the rest shall in no manner be affected,³² or where a constitutional provision prescribes that if a statute contains any subject not expressed in its title, the invalidity shall affect only those subjects not expressed in the title.³³

So far as the question of partial invalidity of a statute for failure to properly express the subject matter in the title is concerned, the case of *Reilly v Knapp*³⁴ is one of the most enlightening:

²⁹ *Huff v Selber*, 10 Fed. (2) 236; *State v Ferschke*, 25 Dela. 477, 81 Atl. 401; *Reilly v Knapp*, 105 Kan. 565, 185 Pac. 47; *Owensboro v Hazel*, 229 Ky. 752, 17 S.W. (2) 1031; *Klatt v Durfee*, 159 Mich. 203, 123 N.W. 542; *State v Hackmann*, 292 Mo. 27, 237 S.W. 742; *State v Heldt*, 115 Neb. 435, 213 N.W. 578; *In re Sackett Street*, 74 N.Y. 95; *Childs v State*, 4 Okla. Cr. 474, 113 Pac. 545; *In re Spangler*, 281 Pa. 118, 126 Atl. 252; *Common. v Chesapeake, etc., R. Co.*, 118 Va. 261, 87 S.E. 622. But where the statute contains two separate and independent subjects with no connection with each other, and the title to one is extensive enough to cover both, and there is nothing to indicate the legislative intention regarding which would have been omitted if it might have known that at least one must be invalid, of course, the entire statute will be invalid. *Thomas v State*, 16 Ala. Ap. 145, 75 So. 821, 201 Ala. 697, 77 So. 1001; *Campe v Cermak*, 330 Ill. 463, 161 N.E. 761; *Jackson v State*, 194 Ind. 248, 142 N.E. 423; *Reilly v Knapp*, 105 Kan. 565, 185 Pac. 47; *Lakes v Goodloe*, 195 Ky. 240, 242 S.W. 632; *State v Ferguson*, 104 La. 249, 28 So. 917; *Skinner v Wilhelm*, 63 Mich. 568, 30 N.W. 311; *State v Lancaster*, 17 Neb. 85, 22 N.W. 228; *Joy v Terrell (Tex.)* 138 S.W. 213; *Simms v Sawyers*, 85 W.Va. 245, 101 S.E. 467. Also see *Davis v State*, 7 Md. 151, where several subjects were involved.

³⁰ *State v Heldt*, 115 Neb. 435, 213 N.W. 578; *Hann v Bedell*, 67 N.J.L. 148, 50 Atl. 364.

³¹ *People v McBride*, 234 Ill. 146, 84 N.E. 865; *Owensboro v Hazel*, 229 Ky. 752, 17 S.W. (2) 1031; *Sutherland v Bishop School Dist. (Tex.)* 261 S.W. 489; *State v Chadbourne*, 162 Wis. 410, 156 N.W. 610.

³² See *Owensboro v Hazel*, 229 Ky. 752, 17 S.W. (2) 1031.

³³ *Sutherland v Bishop School Dist. (Tex.)* 261 S.W. 489.

³⁴ *Reilly v Knapp*, 105 Kan. 565, 185 Pac. 47.

In *State v Barrett*, 27 Kan. 213, the question came before this court for the first time, and Justice Valentine, speaking for the court, said:

“Where an act contains two separate and independent subjects having no connection with each other, and the title to the act is broad enough to cover both, whether such an act or any portion of its has any validity has not yet been settled or determined by this court; but we think that probably and as a general rule it has not. . . .”

The general rule is stated in Cooley's Constitutional Limitations, 5th ed., page 178, as follows:

“But if the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act valid as to the one and void as to the other. . . .”

There are but few exceptions, however, to the general rule as stated by Mr. Cooley. The only case we have found is *State v Lancaster County*, decided by the Nebraska court in 1885. The opinion, after quoting the general rule from Cooley's Constitutional Limitations, *supra*, uses this language:

“But this rule will apply only in those cases where it is impossible from an inspection of the act itself to determine which act or rather which part of the act is void and which valid. Where this can be done the rule does not apply, unless it shall appear that the invalid portion was designed as an inducement to pass the valid, so that the whole taken together will warrant the belief that the legislature would not have passed the valid part alone. The valid portion of the act in the case under consideration is separate and distinct from that which is invalid, and it is very clear that the invalid portion did not have and could not have had the effect to induce the legislature to pass the amendment in question, and therefore the amended act is valid.”

The Nebraska case involved a statute affecting the sale of school lands. It is not nearly so strong a case for upholding the exception to the general rule as the case at bar, where . . . there can be no doubt that the legislature would have passed the general appropriation act for the payment of the salaries of the executive and judicial branches of government if it had realized that a portion of the act establishing the qualifications of officers could not be combined in the same act.

CHAPTER XVII

JUDICIAL NOTICE, PLEADING AND PROOF OF STATUTES

- § 147. In General.
- § 148. Judicial Notice.
- § 149. Pleading of Statutes, Generally.
- § 150. Pleading of Construction.
- § 151. Presumptions Regarding Foreign Law in Absence of Evidence.
- § 152. Proof of Foreign Laws—Authenticated Copies.
- § 153. Proof of Foreign Laws—Statute Books
- § 154. Proof of Foreign Laws—Parol Testimony.
- § 155. Proof of Foreign Laws—Construction.
- § 156. Respective Spheres of the Court and Jury in Regard to Foreign Laws.

§ 147. **In General.**—Public,¹ or general statutes,² do not need to be pleaded or proved, as the courts of the state of enactment will take judicial notice of their existence and contents.³ But private statutes,⁴ and the statutes of another state or country,⁵ usually

¹ For further treatment of public laws, see Chapt. VIII, *supra*.

² For further treatment of general statutes, see Chapt. VIII, *supra*.

³ *Unity v Burrage*, 103 U.S. 447, 26 L.Ed. 405; *Spokane Falls, etc., R. Co. v. Ziegler*, 167 U.S. 65, 42 L.Ed. 79, 17 S.Ct. 728; *Belding v State*, 25 Ark. 315; *Draggett v Colgan*, 92 Calif. 53, 28 Pac. 51, 14 L.R.A. 474; *Louisville, etc., R. Co. v Scott*, 133 Ky. 724, 118 S.W. 990; *Wentz v Chicago, etc., R. Co.* 259 Mo. 450, 168 S.W. 1166; *Benner v Atlantic Dredging Co.*, 134 N.Y. 156, 31 N.E. 328, 17 L.R.A. 220. Also see *Field, Judicial Notice of Public Acts Under the Full Faith and Credit Clause* (1928) 12 Minn. L.Rev. 439.

⁴ *Gardner v Barney*, 6 Wall. (U.S.) 499, 18 L.Ed. 890; *Perry v New Orleans, etc., R. Co.*, 55 Ala. 413. Some states, however, have enacted statutes by which private acts will also be judicially noticed. *Junction R. Co. v Ashland Bank*, 12 Wall. (U.S.) 226, 21 L.Ed. 385. This is the sensible rule. 5 Wigmore, *Evidence* (2nd Ed. 1923) p. 583, note 14. For further discussion of private statutes, see Chapter VIII, *supra*; also § 69, *supra*.

⁵ *The New York*, 175 U.S. 187, 44 L.Ed. 126, 20 S.Ct. 67; *Wickersham v Johnston*, 104 Calif. 407, 38 Pac. 89; *Hale v New Jersey Steam Nav. Co.*, 15 Conn. 539; *Royal Ins. Co. v Simon* (Del. Ch.) 174 Atl. 444; *Owen v Boyle*, 15 Me. 147; *Electric Welding Co. v Prince*, 200 Mass. 386, 86 N.E. 947; *O. W. Kerr Co. v Nygreen*, 114 Minn. 268, 130 N.W. 1112; *Southern Ill. Bridge Co. v Stone*, 174 Mo. 1, 73 S.W. 453; *Hall v Costello*, 48 N.H. 176; *Rape v Heaton*, 9 Wis. 328, and see Note, 67 L.R.A. 33. See Mich. L.Rev. 375 (1922) for discussion of statutes authorizing courts to take judicial notice of the laws of another state.

referred to as foreign statutes, must be pleaded and proved. And in accord with these rules, the federal courts will also take judicial notice of the general or public statutes of the various states,⁶ as well as of all public federal statutes.⁷ Similarly, the state courts will take judicial notice of the public statutes of the federal government.⁸

§ 148. Judicial Notice.—Judicial notice simply takes the place of the proof of a fact.⁹ In other words, it displaces evidence.¹⁰ But this does not mean that the court cannot resort to evidence in order to refresh its memory or to give it knowledge of a fact of which it should be aware.¹¹ Accordingly, in seeking to inform itself concerning a statute of which the court can take judicial notice, resort

⁶ *Missouri, etc., R. Co. v Wulf*, 226 U.S. 570, 57 L.Ed. 355, 33 S.Ct. 135; *Pennington v Gibson*, 9 Wall. 108 (U.S.) 19 L. Ed. 604; *Moore v Pywell*, 29 App. D.C. 312; *Mills v Green*, 159 U.S. 651, 40 L.Ed. 293, 16 S.Ct. 132, and see Note 4 L.R.A. 33.

⁷ *Missouri, etc., R. Co. v Wulf*, 226 U.S. 570, 57 L.Ed. 355, 33 S.Ct. 135. Executive proclamation considered a public act and entitled to judicial notice, see *Armstrong v U.S.*, 13 Wall. (U.S.) 154, 20 L.Ed. 614. Likewise, as a general rule, wherever an act of congress expressly entrusts the power to either of the principal departments of the government to prescribe rules and regulations for the transaction of business in which the public is interested, and in which they have a right to participate, and by which they are controlled, the rules and regulations thus prescribed become a part of the public records of which the courts will take judicial notice. *Jones v U.S.*, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691; *Caha v U.S.*, 152 U.S. 211, 14 S.Ct. 513, 38 L.Ed. 415.

⁸ See cases under note 3, *supra*. Also see Note, 47 L.R.A. (N.S.) 75. *Mangum v Atlantic Coast Line Co.*, 188 N.C. 689, 125 S.E. 549.

⁹ *Brown v Piper*, 91 U.S. 37, 23 L.Ed. 200; *Common. v Marzynski*, 149 Mass. 69, 21 N.E. 228.

¹⁰ *Ricaud v American Metal Co.*, 246 U.S. 304, 62 L.Ed. 733, 38 S.Ct. 312; *Sovereign Camp, etc., v. Allen*, 206 Ala. 41, 89 So. 58; *State v Main*, 69 Conn. 123, 37 Atl. 80; *Amos v Mosley*, 74 Fla. 555, 77 So. 619; *Gay v Eugene*, 53 Ore. 289, 100 Pac. 306. "In its appropriate field it displaces evidence, since, as it stands for proof, it fulfils the object which evidence is designed to fulfil, and makes evidence unnecessary." *State v Main*, 69 Conn. 123, 37 Atl. 80, 84, 36 L.R.A. 623.

¹¹ *State v Morris*, 47 Conn. 179; *State v Main*, 69 Conn. 123, 37 Atl. 80.

may be had to the printed statute,¹² or to the enrolled act,¹³ or even to the journals of the legislature,¹⁴ although the court is not limited to any particular source but may resort to any which is trustworthy.¹⁵ There is very little reason for the court to be strictly bound by the ordinary rules of evidence in the presentation of proof of a statute where judicial notice is applicable; at least, considerable liberality should be allowed.

§ 149. Pleading of Statutes, Generally.—As we have already indicated, it is not necessary that public or general laws be

¹² *Pease v Peck*, 18 How. (U.S.) 595, 15 L.Ed. 518; *Spangler v Jacoby*, 14 Ill. 297; *Brannock v St. Louis, etc., R. Co.*, 200 Mo. 561, 98 S.W. 604; *State v Groves*, 80 Ohio St. 351, 88 N.E. 1096; *McLendon v Columbia*, 101 S.C. 48, 85 S.E. 234, 5 L.R.A. 990.

¹³ *Ibid.* "The result of the authorities in England and in the other States clearly is, that, at common law, whenever a general statute is misrecited, or its existence denied, the question is to be tried and determined by the court as a question of law—that is to say, the court is bound to take notice of it, and inform itself the best way it can; that there is no plea by which its existence can be put in issue and tried as a question of fact; that if the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed or weakened by the journals of parliament or any other less authentic or less satisfactory memorials; and that there has been no departure from the principles of the common law in this respect in the United States, except in instances where a departure has been grounded on, or taken in pursuance of some express constitutional or statutory provision requiring some relaxation of the rule." *Sherman v Story*, 30 Calif. 253.

¹⁴ At least, where the enrolled bill cannot be found and its existence questioned. *State v Wheeler*, 172 Ind. 578, 89 N.E. 1; *Hollingsworth v Thompson*, 45 La. Ann. 222, 12 So. 1. But see *Post v Kendall County*, 105 U.S. 667, 26 L.Ed. 1204.

¹⁵ *Hollingsworth v Thompson*, 45 La. Ann. 222, 12 So. 1; *Milwaukee v Isenring*, 109 Wis. 9, 85 N.W. 131, 53 L.R.A. 635; *State v Swan*, 7 Wyo. 166, 51 Pac. 209, 40 L.R.A. 195. See also *Powell v Hays*, 83 Ark. 448, 104 S.W. 177; *Brannock v St. Louis, etc., R. Co.*, 200 Mo. 561, 98 S.W. 604. "The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument—something which is already in the court's possession, or, at any rate, is so accessible that there is no occasion to use any means to make the court aware of it. *Thayer, Cas. Ev.* 20. If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be in any proper sense, the admission of evidence but simply a resort to a convenient means of refreshing the memory, or making the trier aware of that of which everybody ought to be aware." *State v Main*, 69 Conn. 123, 37 Atl. 80, 38 L.R.A. 623.

pleaded.¹⁶ Indeed, any statute, regardless of its nature, of which the court will take judicial notice does not need to be pleaded.¹⁷ This rule is founded upon the principle that such laws "are read into every pleading".¹⁸ However, it is essential that sufficient facts be stated in the pleadings to bring the case within the scope of the particular statute involved.¹⁹ On the other hand, private²⁰ and

¹⁶ Not even by title—*Atlantic Coast Line R. Co. v State*, 73 Fla. 609, 74 So. 595; *Ervin v State*, 150 Ind. 332, 48 N.E. 249; *Eckert v Head*, 1 Mo. 593; *Anderson v Pantages Theatre Co.*, 114 Wash. 24, 194 Pac. 813, or number—*McKenzie v United R. Co.*, 216 Mo. 1, 115 S.W. 13, or date of passage—*Ervin v State*, 150 Ind. 332, 48 N.E. 249, or by any reference whatsoever—*Smith v Detroit*, etc., R. Co., 175 Fed. 506; *Chicago*, etc., R. Co. v *Porter*, 72 Iowa 426, 34 N.W. 286; *Hayes v West Bay City*, 91 Mich. 418, 51 N.W. 1067; *Pipes v Mo. Pac. R. Co.*, 267 Mo. 385, 184 S.W. 79; *O'Brien v Kursheedt*, 29 N.Y.S. 973; *Hadfield-Penfield Steel Co. v Sheller*, 108 Ohio St. 106, 141 N.E. 89; *Herrett v Warm Springs Irr. Dist.*, 86 Ore. 343, 168 Pac. 609.

¹⁷ *People ex rel Krajci v Kelly*, 279 Ill. Ap. 22; *Lillis v City of Big Timber (Mont.)* 62 Pac. (2) 219.

¹⁸ *Rush v McDonnell*, 214 Ala. 47, 106 So. 175; *Dinkins v Prescott*, 7 (Porto Rico) Fed. 271.

¹⁹ *Missouri*, etc., R. Co. v *Wulf*, 226 U.S. 570, 57 L.Ed. 355, 33 S.Ct. 135; *Steagall v Sloss-Sheffield Steel Co.*, 205 Ala. 100, 87 So. 787; *Inspiration Consol. Copper Co. v Bryan*, 31 Ariz. 302, 252 Pac. 1012; *Denver*, etc., R. Co. v *De Graff*, 2 Colo. Ap. 42, 29 Pac. 664; *Leone v Kelley*, 77 Conn. 569, 60 Atl. 136; *Roberts v Am. Nat. Bank*, 94 Fla. 427, 115 So. 261; *People v Taylor*, 281 Ill. 355, 117 N.E. 1047; *Ervin v State*, 150 Ind. 332, 48 N.E. 249; *Anderson v Daugherty*, 182 Ky. 800, 207 S.W. 474; *Karahalies v Dukais*, 108 Me. 527, 81 Atl. 1011; *Clark v North Muskegon*, 88 Mich. 308, 50 N.W. 254; *Moyer v Chicago*, etc., R. Co. (Mo.) 198 S.W. 839; *Nichols v Western Union Tel. Co.*, 44 Nev. 148, 191 Pac. 573; *South v West Windsor*, 82 N.J. Law. 262, 82 Atl. 852; *Duffy v Shirden*, 124 N.Y.S. 529, 139 Ap.Div. 755; *Hadfield-Penfield Steel Co. v Sheller*, 108 Ohio St. 106, 141 N.E. 89; *Goldberg v Friedrich*, 279 Pa. 572, 124 Atl. 186; *Kettelle v Warwick*, etc., Water Co., 24 R.I. 485, 53 Atl. 631; *Anderson v Pantages Theatre Co.*, 114 Wash. 24, 194 Pac. 813; *Louis v Smith-McCormich Construc. Co.*, 80 W.Va. 159, 92 S.E. 249.

²⁰ *Garlich v Northern Pac. R. Co.*, 131 Fed. 837; *Atchison*, etc., R. Co. v *Blackshire*, 10 Kan. 477; *Zable v Louisville Baptist Orphans Home*, 92 Ky. 89, 17 S.W. 212, 13 L.R.A. 668; *Hooper v New York City*, 160 N.Y.S. 14, 96 Misc. 47; *Bolick v Charlotte*, 191 N.C. 677, 132 S.E. 660; *Tod v Massey (Tex. Civ. Ap.)* 30 S.W. (2) 532; *Hewitt v Grand Chute*, 7 Wis. 282.

foreign²¹ laws must be pleaded like any other issuable fact. Nor does the existence of a statute requiring the court to take judicial note of the pleaded laws of a sister state dispense with the necessity of pleading such foreign statutes.²²

Under the common law in pleading private acts, it was necessary to set them out in full,²³ or, at least, in substance,²⁴ although this did not require the pleading of the title²⁵ or of the preamble.²⁶ Some states, however, provide by statute that a reference in the pleadings to the title, the date of approval and the allegation of enough of its substance as may be pertinent to the case,²⁷ or simply by reference to the title and date of passage,²⁸ or date of passage and the chapter number,²⁹ will suffice. In like manner, where the statutes of a sister state or of a foreign country are relied on as the

²¹ *The Hanna Nielson*, 25 Fed. (2) 984; *Tatum v Commercial Bank*, 193 Ala. 120, 69 So. 508; *Nesbit v MacDonald*, 203 Calif. 219, 263 Pac. 1007; *Fern v Crandell*, 79 Colo. 403, 246 Pac. 270; *Thomas v Grand Trunk R. Co.*, 17 Del. 593, 42 Atl. 987; *Edwards v Schillinger*, 245 Ill. 231, 91 N.E. 1048; *Cincinnati, etc., R. Co. v McMullen*, 117 Ind. 439, 20 N.E. 287; *In re Capper*, 85 Iowa 82, 52 N.W. 6; *U.S. Banking Co. v Veale*, 84 Kan. 385, 114 Pac. 229; *Richards v Richards (Mass.)* 169 N.E. 891; *Great Western R. Co. v Miller*, 19 Mich. 305; *First Nat. Bank v Halvorson*, 176 Minn. 406, 223 N.W. 618; *Bennett v Lohman*, 292 Mo. 477, 238 S.W. 792; *Twamley v Chicago Great Western R. Co.*, 111 Neb. 311, 196 N.W. 319; *International Text Book Co. v Connelly*, 206 N.Y. 188, 99 N.E. 722; *Howard v Howard*, 200 N.C. 574, 158 S.E. 101; *Erie R. Co. v Welsh*, 89 Ohio St. 81; *Crocker v Russell*, 133 Ore. 213, 287 Pac. 224; *Marx v Hefner*, 46 Okla. 453, 149 Pac. 207; *Callaway v Prettyman*, 218 Pa. 293, 67 Atl. 418; *Wellman v Mead*, 93 Vt. 322, 107 Atl. 396; *McDowell v Cox*, 108 Va. 460, 62 S.E. 272; *Welch v Dunning*, 163 Wis. 535, 158 N.W. 323.

²² *Corbett v Terminal R. Assn. (Mo.)* 82 S.W. (2) 97.

²³ *Middletown Bank v Russ*, 3 Conn. 135; *Hewitt v Grand Chute*, 7 Wis. 282.

²⁴ *Broad St. Hotel Co. v Weaver*, 57 Ala. 26; *Goshen, etc., Turnp. Co. v Sears*, 7 Conn. 86.

²⁵ See *Mills v Wilkins (Eng.)* 6 Mod. 62, 87 Reprint 822.

²⁶ *Ibid.*

²⁷ *East Line, etc., R. Co. v Rushing*, 69 Tex. 306, 6 S.W. 834.

²⁸ See *Wilson v Clark*, 11 Ind. 385.

²⁹ See *Hooper v New York*, 160 N.Y.S. 14, 96 Misc. 47.

foundation of a cause of action or a defense,³⁰ they too, must be pleaded,³¹ not necessarily in *haec verba*,³² although such a pleading is a sufficient pleading,³³ but in sufficient substance so as to enable the court to determine the meaning and effect thereof.³⁴ Mere reference to the foreign statute by title,³⁵ or title and chapter number,³⁶

³⁰ Such a statute, however, does not need to be pleaded, if it merely consists of matters of evidence, that is, if such a statute is only probative as distinguished from issuable facts. *Wood v Johnson*, 117 Minn. 267, 135 N.W. 746. Also see *Drtna v Charles Tea Co.*, 281 Ill. 259, 118 N.E. 69; *Scott v Mundy*, 193 Iowa 1360, 188 N.W. 972, 23 A.L.R. 460; *Thomson-Houston Elec. Co. v Palmer*, 52 Minn. 174, 53 N.W. 1137; *First Nat. Bank v Halvorson*, 176 Minn. 406, 223 N.W. 618; *Fogle v Pindell*, 248 Mo. 65, 154 S.W. 81; *Atlantic Mut. Fire Ins. Co. v Sanders*, 36 N.H. 252; *Archer v New York, etc., R. Co.*, 106 N.Y. 589, 13 N.E. 318; *Cunningham v Spokane Hydraulic Min. Co.*, 20 Wash. 450, 55 Pac. 756. Consequently, no pleading was necessary to introduce in evidence, in an action against a Nevada corporation, a copy of a statute relating to actions by and against dissolved corporations, in order to negative pleaded disincorporation. *Matson v Kennecot Mines Co.*, 101 Wash. 12, 171 Pac. 1040, 175 Pac. 181.

³¹ *The Hanna Nielsen*, 25 Fed. (2) 984; *Edwards v Schillinger*, 245 Ill. 231, 91 N.E. 1048; *In re Capper*, 85 Iowa 82, 52 N.W. 6; *U.S. Banking Co. v Veale*, 84 Kan. 385, 114 Pac. 229; *Louisville, etc., R. Co. v Southern R. Co.*, 36 S.W. (2) 20, 237 Ky. 618; *First Nat. Bank v Halvorson*, 176 Minn. 406, 223 N.W. 618; *Musser v Musser*, 281 Mo. 649, 221 S.W. 46; *Southworth v Morgan*, 205 N.Y. 293, 98 N.E. 490; *Dean v Dean*, 162 Wis. 303, 153 N.W. 323.

³² *St. Louis, etc., R. Co. v Haist*, 71 Ark. 258, 72 S.W. 893; *Louisville, etc., R. Co. v Shires*, 108 Ill. 617; *Moe v Shaffer*, 150 Minn. 114, 184 N.W. 785, 18 A.L.R. 1194; *Wilkinson v Geist*, 3 Pa. Dist. & Co. 573; *Wellman v Mead*, 93 Vt. 322, 107 Atl. 396. But see *The City of Athens*, 17 Fed. (2) 308; *Grand Lodge v Clark*, 189 Ind. 373, 127 N.E. 280, 18 A.L.R. 1190 and note.

³³ *Byrd v Aetna Life Ins. Co. (Ala. Ap.)* 146 So. 78.

³⁴ *Forsythe v Preer*, 62 Ala. 443; *Consolidated Tank Line Co. v Collier*, 148 Ill. 259, 35 N.E. 756; *Wabash v Hassett*, 170 Ind. 370, 83 N.E. 705; *Bean v Briggs*, 4 Iowa 464; *Walker v Maxwell*, 1 Mass. 104; *Moe v Shaffer*, 150 Minn. 114, 184 N.W. 785, 18 A.L.R. 1194; *Wentz v Chicago, etc., R. Co.*, 259 Mo. 450, 168 S.W. 1166; *Salt Lake Nat. Bank v Hendrickson*, 40 N.J.L. 52; *Wellman v Mead*, 93 Vt. 322, 107 Atl. 396. That mere statement of substance or citation is insufficient, see *Martin Bros. v Nettleton*, 138 Wash. 102, 244 Pac. 386.

³⁵ *Engleman v Cable*, 4 Ind. Ter. 336, 69 S.W. 894. Also see *Carey v Cincinnati, etc., R. Co.*, 5 Iowa 357; *Becht v Harris*, 4 Minn. 504; *Gibson v Chicago Great Western R. Co.*, 225 Mo. 542.

³⁶ *McDonald v Des Moines Banker's Life Assoc.*, 154 Mo. 618, 55 S.W. 999.

or section number,³⁷ or the like,³⁸ will not be sufficient. Nor will an allegation of the supposed effect of the foreign statute suffice.³⁹

Undoubtedly, the most satisfactory manner of pleading a statute is to give its title and chapter, or section number, and to state the substance of its provisions, so far as they are applicable to the case at bar.^{39a} In any event, the citation should be given.⁴⁰

§ 150. Pleading of Construction.—As we will see hereafter, the construction of a statute becomes a part of the statute to the same extent as if originally incorporated in it.⁴¹ Consequently, unless provided otherwise by statute,⁴² reliance on a foreign statute as the basis of a cause of action or defense, requires not only a proper pleading of the statute,⁴³ but also a sufficient pleading of its construction by

³⁷ *State Nat. Bank v Levy*, 141 Mo. Ap. 288, 125 S.W. 542.

³⁸ *Atlantic Coast Line R. Co. v Barton*, 14 Ga. Ap. 160, 80 S.E. 530; *Swing v Karges Furniture Co.*, 150 Mo. Ap. 574, 131 S.W. 153; *Martin Bros. v Nettleton*, 138 Wash. 102, 244 Pac. 386; also see Note 18, A.L.R. 1190.

³⁹ *Lamb v Pioneer Sav. Co.*, 96 Ala. 430, 11 So. 154; *Thomas v Grand Trunk R. Co.*, 17 Del. 593, 42 Atl. 987; *Pearce v Rhawn*, 13 Ill. Ap. 637; *Grand Lodge v Clark*, 189 Ind. 373, 127 N.E. 280, 18 A.L.R. 1190; *Green v Equitable Mut. Life Assn.*, 105 Iowa 628, 75 N.W. 635; *Valz v Birmingham First Nat. Bank*, 96 Ky. 543, 29 S.W. 329; *Bank of Commerce v Fuqua*, 11 Mont. 285, 28 Pac. 291; *Ott v Ott*, 3 Ohio S. & C.P. 684; *Stockton v Lehigh Coal Co.*, 14 Phila. 77; *Lowry v Moore*, 16 Wash. 476, 48 Pac. 238. *Contra*: *Sultan of Turkey v Tiryakian*, 213 N.Y. 429, 108 N.E. 72; *Burge v Broussard (Tex. Civ. Ap.)* 258 S.W. 502. And note *Moe v Schaffer*, 150 Md. 114, 184 N.W. 785, 18 A.L.R. 1194.

^{39a} *Allard v La Plain*, 147 Wash. 497, 266 Pac. 688. Also see *Showalter v Richert*, 64 Kan. 82, 67 Pac. 454.

⁴⁰ *Bank of America v Sunseri*, 311 Pa. 114, 166 Atl. 573. Also see *Musser v Musser*, 281 Mo. 649, 221 S.W. 46.

⁴¹ See § 184, *infra*.

⁴² See *Ramey v Mo. Pac. R. Co.*, 323 Mo. 662, 21 S.W. (2) 873, where such a statute was involved. By virtue of the language of the court, even in the absence of statute, it would seem that a pleading of the foreign statute's construction would be unnecessary: "The construction put upon a statute by the courts of the state in which it was enacted become in effect a part of the statute. When such statute is pleaded, why should not the court required to construe it, be thereby authorized to seek its meaning and effect from decisions of the court whose official duty it is to determine that question?"

⁴³ *Donald v Hewitt*, 33 Ala. 534; *Fidelity Loan Securities Co. v Moore*, 280 Mo. 315, 217 S.W. 286; *Ingraham v Hart*, 11 Ohio 255. Also see *supra*, § 149.

the courts of the state of its enactment.⁴⁴ It is sufficient, however, to set forth the holdings of the foreign court, without referring to the titles of the cases, or stating the facts upon which the decisions were founded.⁴⁵ And, obviously, the decision of a court of last resort should always be pleaded rather than that of an intermediate court.⁴⁶

§ 151. Presumptions Regarding Foreign Law in Absence of Evidence.—In the absence of proof to the contrary, many authorities adhere to the view that there is a presumption that the statute law of a sister state is the same as that of the forum.⁴⁷ This is consonant with the view that, in the absence of evidence indicating otherwise, the common law of a sister state is presumed to be the same as the

⁴⁴ But note *Knotts v Clark Constr. Co.*, 191 Ind. 354, 131 N.E. 921, 132 N.E. 678, that a foreign construction need not be pleaded unless different from that of the courts of the state where the action is pending.

⁴⁵ *Angel v Van Schaick*, 132 N.Y. 187, 30 N.E. 395. But in Missouri the court seems to think that there should be a reference to the place where the decision may be found. *Musser v Musser*, 281 Mo. 649, 221 S.W. 46.

⁴⁶ *Bank of America v Sunseri*, 311 Pa. 114, 166 Atl. 573.

⁴⁷ In *re Pussy*, 177 Calif. 367, 170 Pac. 846; *Douglas v Douglas*, 22 Idaho 366, 125 Pac. 796; *Nehring v Nehring*, 164 Ill. Ap. 527; *Calhoun v Taylor*, 178 Iowa 56, 159 N.W. 600; *Newton v New York Life Ins. Co.*, 95 Kan. 427, 148 Pac. 619; *Mulling v Jones*, 142 La. 300, 76 So. 720; *St. Joseph, etc., R. Co. v Elwood Grain Co.*, 199 Mo. Ap. 432, 203 S.W. 680; *Bethel v Pawnee County*, 95 Neb. 203, 145 N.W. 363; *Dittman v Distilling Co.*, 64 N.J. Eq. 537, 54 Atl. 570; *McNair v Underwood*, 44 Okla. 585, 155 Pac. 553; *Garetson Lumber Co. v Hinson*, 69 Ore. 605, 140 Pac. 633; *Taber v Talcott*, 40 R.I. 338, 101 Atl. 2; *Windhorst v Bergendahl*, 21 S.D. 218, 111 N.W. 544; *North Memphis Sav. Bank v Union Bridge Co.*, 138 Tenn. 161, 196 S.W. 492; *Brand v Eubank (Tex. Civ. Ap.)* 81 S.W. (2) 1023; *In re Campbell (Utah)* 173 Pac. 688; *Moreland v Moreland*, 108 Va. 93, 60 S.E. 730; *Marston v Rue*, 92 Wash. 129, 159 Pac. 111; *Hamley v Till*, 162 Wis. 533, 156 N.W. 968. And the burden of asserting and proving any difference, is upon the party who claims a variance. *Brand v Eubank (Tex. Civ. Ap.)* 81 S.W. (2) 1023.

law of the forum.⁴⁸ But other authorities refuse to accept this presumption of uniformity so far as statute law is concerned.⁴⁹ After all, perhaps this latter group of authorities represents the better view, for it is obvious that in some instances the presumption will become operative even though the sister state does not have a statute on the matter in controversy, or, at best, has a statute with quite different provisions.⁵⁰ And, as is apparent, it is quite difficult, so far as foreign laws are concerned, to distinguish between the problems of presumptions and those pertaining to judicial notice.⁵¹

⁴⁸ *Corinth Bank v King*, 182 Ala. 403, 62 So. 704; *McCormack v McCormack*, 175 Calif. 292, 165 Pac. 930; *Am. Woolen Co. v Maaget*, 86 Conn. 234, 85 Atl. 583; *Seaboard Air Line R. Co. v Andrews*, 140 Ga. 254, 78 S.E. 925; *Maloney v Winston Bros. Co.*, 18 Ida. 740, 111 Pac. 1080; *Forsyth v Barnes*, 228 Ill. 326, 81 N.E. 1028; *Southern R. Co. v Elliott*, 170 Ind. 273, 82 N.E. 1051; *Harold v Atchison, etc., R. Co.*, 93 Kan. 456, 144 Pac. 823; *Trent v Norfolk, etc., R. Co.*, 167 Ky. 319, 180 S.W. 792; *Franklin Motor Co. v Hamilton*, 113 Me. 63, 92 Atl. 321; *Bristol Bank v Baltimore*, 99 Md. 661, 59 Atl. 134; *Cogliano v Ferguson*, 228 Mass. 147, 117 N.E. 45; *Beard v Chicago, etc., R. Co.*, 134 Minn. 162, 158 N.W. 815; *Stronghurst First Nat. Bank v Kirby (Mo.)* 175 S.W. 926; *Trafton v Garnsey*, 78 N.H. 256, 99 Atl. 290; *Bodine v Berg*, 82 N.J.L. 662, 82 Atl. 901; *International Text Book Co. v Connelly*, 206 N.Y. 188, 99 N.E. 722; *Carpenter v Hanes*, 167 N.C. 551, 83 S.E. 577; *Pratt v Pratt*, 29 N.D. 531, 151 N.W. 294; *Palmer v Noe*, 48 Okla. 450, 150 Pac. 462; *Garetson Lumber Co. v Hinson*, 69 Ore. 605, 140 Pac. 633; *Cape May Real Estate Co. v Henderson*, 42 Pa. Super 1; *O'Donnell v Johnson*, 36 R.I. 308, 90 Atl. 165; *Gilliland v Southern R. Co.*, 85 S.C. 26, 67 S.E. 20; *Western Union Tel. Co. v Bailey (Tex. Civ. Ap.)* 184 S.W. 519; *In re Campbell (Utah)* 173 Pac. 688; *Moreland v Moreland*, 108 Va. 93, 60 S.E. 730; *Plath v Mullins*, 37 Wash. 403, 151 Pac. 811; *Elmergreen v Weimer*, 138 Wis. 112, 119 N.W. 836.

⁴⁹ *Cuba R. Co. v Crosby*, 222 U.S. 473, 56 L.Ed. 274, 32 S.Ct. 132; *Downs v Minchew*, 30 Ala. 86; *Selma, etc., R. Co. v Lacy*, 43 Ga. 461; *Murray v Louisville, etc., R. Co.*, 132 Ky. 336, 110 S.W. 334; *Holbrook v Libby*, 113 Me. 389, 94 Atl. 482; *Schaun v Brandt*, 116 Md. 560, 82 Atl. 551; *Lemieux v Boston, etc., R. Co.*, 219 Mass. 399, 106 N.E. 992; *Gordon v Ward*, 16 Mich. 360; *Farmers' State Bank v Walch*, 133 Minn. 230, 158 N.W. 253; *Leach v Pillsbury*, 15 N.H. 137; *International Text Book Co. v Connelly*, 206 N.Y. 188, 99 N.E. 722; *Gooch v Faucett*, 122 N.C. 270, 29 S.E. 362, 39 L.R.A. 835; *Shoenberger's Est.*, 22 Pa. Dist. 126; *Rosemand v Southern R. Co.*, 66 S.C. 91, 44 S.E. 574.

⁵⁰ *Columbia Bldg., etc., Assn. v Rice*, 68 S.C. 236, 47 S.E. 63. Also note *Kales, Presumption of Foreign Law*, 19 Harvard L.R. 401 (1924), 22 Mich. L.Rev. 734.

⁵¹ See *Kales, Presumptions of Foreign Law* (1906) 19 Harvard L.Rev. 401. Also see 23 Mich. L.Rev. 184 (1924) and *Freyman v Day*, 108 Wash. 71, 182 Pac. 940.

§ 152. **Proof of Foreign Laws—Authenticated Copies.**—Probably the best evidence of the statute law of a sister state,⁵² or of a foreign country,⁵³ is an authenticated copy of the statute,⁵⁴ or of the pertinent sections⁵⁵ involved. Congress, by virtue of the constitutional provision authorizing it to prescribe the manner in which state statutes shall be proved,⁵⁶ has enacted legislation providing that such statutes shall be authenticated by having the seals of the respective states affixed thereto.⁵⁷ As a result, a copy of a statute duly authenticated in accord with the federal law is properly admissible in evidence to prove the statute of a sister state.⁵⁸ Similarly, a statute of a sister state, duly authenticated in accord with the law of the state of the forum, is also proper evidence of such foreign statute.⁵⁹

⁵² *Raynham v Canton*, 3 Pick (Mass.) 293. And the existence, at the time of a transaction, of an apparently subsequently enacted statute of a sister state cannot be proved by the decision of such state as effective at the date of the transaction. *Citizens Bank v Hebernia Bank* (La. Ap.) 140 So. 705. Similarly, a letter from the attorney general of a sister state is inadmissible to prove a law of such state. *Miller v Miller*, 257 Ill. Ap. 287; also see *Conkling v Roman Catholic Asylum*, 116 N.Y. 593, 59 N.E. 1120.

⁵³ See *Church v Hubbard*, 2 Cranch (U.S.) 187, 2 L.Ed. 249.

⁵⁴ *Church v Hubbard*, 2 Cranch (U.S.) 187, 2 L.Ed. 249; *Raynham v Canton*, 3 Pick. (Mass.) 293. For part played by journal entries in this respect, see § 143, *supra*.

⁵⁵ See *Hunter v Fulcher*, 5 Rand. (Va.) 126.

⁵⁶ U.S. Const., Art. IV, § 1.

⁵⁷ See U.S.C.A., Title 28, § 687.

⁵⁸ *U.S. v Amedy*, 11 Wheat. (U.S.) 392, 6 L.Ed. 502; *Wilson v Walker*, 3 Stewart (Ala.) 211; *Hudson v Greenhill Seminary Corp.*, 113 Ill. 618; *Ansley v Meikle*, 81 Ind. 260; *Robinson v Gilman*, 20 Me. 299; *Goldsbrough v Tinsley*, 138 Md. 411, 113 Atl. 861; *Ridpath v Heller*, 46 Mont. 586, 129 Pac. 1054; *Topliff v Richardson*, 76 Neb. 114, 107 N.W. 114; *Toulondou v Lachenmeyer*, 31 N.Y. Super. 45; *State v Cheek*, 35 N.C. 114; *Grant v Henry Coal Co.*, 80 Pa. 208; *Couch v State*, 140 Tenn. 156, 203 S.W. 831.

⁵⁹ *Ibid.*

Although the introduction of authenticated copies, does not constitute an exclusive method of proving the laws of a sister state,⁶⁰ a copy to be admissible in evidence must be duly authenticated. Proper authentication may be by the seal of a state properly affixed, or by the oath of a witness who has compared the copy with the original.⁶¹ Since this seal then imports absolute verity,⁶² no other formality is required.⁶³ Likewise, the authentication of the statute of a foreign country may be made by a seal of that government properly affixed,⁶⁴ or by a verification of a witness who has compared the copy with the original.⁶⁵ Moreover, the certificate of an official authorized to supply the copy, duly proved, may also be sufficient.⁶⁶

§ 153. Proof of Foreign Laws—Statute Books.—As a general

⁶⁰ See *infra*, §§ 153-154. That the federal method is not exclusive, see *U.S. v Johns*, 4 Dall. (U.S.) 412, 1 L.Ed. 888, and *Jones*, *Evidence* (3rd Ed.) (1924) § 503.

⁶¹ *Pierce v Indseth*, 106 U.S. 546, 27 L.Ed. 254, 1 S.Ct. 418; *Baltimore, etc., R. Co. v Glenn*, 28 Md. 287; *Anglo-American Land Co. v Dyer*, 181 Mass. 593, 64 N.E. 416; *State v Twitty*, 9 N.C. 441. And see *Ennis v Smith*, 14 How. (U.S.) 400, 14 L.Ed. 472, that foreign statutes "may be verified by an oath or by an exemplification of a copy, under the great seal of a state, or, by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by the certificate of an officer, properly authorized by law, to give the copy; which certificate must be duly proved. Consequently, a statute identified by a member of the London bar as a statute of England was properly authenticated. *Hartzell v U.S.*, 72 Fed. (2) 569, cert. den. 55 S.Ct. 216.

⁶² *U.S. v Amedy*, 11 Wheat. (U.S.) 392, 6 L.Ed. 502; *Lincoln v Battelle*, 6 Wend. (N.Y.) 475.

⁶³ *U.S. v Amedy*, 11 Wheat. (U.S.) 392, 6 L.Ed. 502.

⁶⁴ *Ennis v Smith*, 14 How. (U.S.) 400, 14 L.Ed. 472; *Baltimore, etc., R. Co. v Glenn*, 28 Md. 287.

⁶⁵ *Ennis v Smith*, 14 How. (U.S.) 400, 14 L.Ed. 472; *Anglo-American Land Co. v Dyer*, 181 Mass. 593, 64 N.E. 416.

⁶⁶ *Ennis v Smith*, 14 How. (U.S.) 400, 14 L.Ed. 472; *Church v Hubbard*, 2 Cranch (U.S.) 187, 2 L.Ed. 249.

rule, the laws of another state,⁶⁷ and those of a foreign country,⁶⁸ may also be proved by the introduction in evidence of a printed volume containing such laws, if it purports to be published by the authority of the government.⁶⁹ Consequently, volumes of statutes privately published are not proper evidence of the statutes of a foreign state,⁷⁰ although a compilation made by virtue of a statute

⁶⁷ *Young v Bank of Alexandria*, 4 Cranch. (U.S.) 384, 2 L.Ed. 655; *Smith v Blinn*, 221 Ala. 24, 127 So. 155; *Barkman v Hopkins*, 11 Ark. 157; *Rogero v Zippel*, 15 So. 326, 33 Fla. 625; *Moore v Pooley*, 17 Idaho 57, 104 Pac. 898; *Eagan v Connelly*, 107 Ill. 458; *New York R. Co. v Lind*, 180 Ind. 38, 102 N.E. 449; *Varner v Interstate Exch.*, 138 Iowa 201, 115 N.W. 1111; *Graziani v Burton (Ky.)* 97 S.W. 800; *Marzette v Cronk*, 141 La. 437, 75 So. 107; *Owen v Boyle*, 15 Me. 147; *Goldsborough v Tinsley*, 138 Md. 411, 113 Atl. 861; *Electric Welding Co. v Prince*, 200 Mass. 386, 86 N.E. 947; *Wilt v Cutler*, 38 Mich. 189; *Stewart v Swanzy*, 23 Miss. 502; *State v National Bank of Levy*, 141 Mo. Ap. 288, 125 S.W. 542; *Ridpath v Heller*, 46 Mont. 586, 129 Pac. 1054; *Emery v Berry*, 28 N.H. 473; *Van Buskirk v Mulock*, 18 N.J.L. 184; *Matter of Huss*, 126 N.Y. 537, 27 N.E. 784, 12 L.R.A. 620; *Copeland v Collins*, 122 N.C. 619, 30 S.E. 315; *Barger v Chesapeake, etc., R. Co.*, 21 Ohio N.P.N.S. 97; *State v McDonald*, 55 Ore. 419, 104 Pac. 967, 106 Pac. 444; *Mullen v Morris*, 2 Pa. 85; *Free v Southern R. Co.*, 78 S.C. 57, 58 S.E. 952; *Martin v Payne*, 11 Tex. 292; *State v Abbey*, 29 Vt. 60, 67 Am.Dec. 754. The same is equally true with reference to copies of the session laws. *Haas v Commerce Trust Co.*, 194 Ala. 672; *Title Guarantee Co. v Trenton Potteries Co.*, 56 N.J. Eq. 441, 38 Atl. 422.

⁶⁸ *Nashua Sav. Bank v Anglo-American Land Co.*, 189 U.S. 221, 47 L.Ed. 782, 23 S.Ct. 517; *Talbot v Seeman*, 1 Cranch (U.S.) 1, 2 L.Ed. 15; *Owen v Boyle*, 15 Me. 147; *Dawson v Peterson*, 110 Mich. 431, 68 N.W. 246; *Russian Reinsurance Co. v Stoddard*, 207 N.Y.S. 574, 211 Ap. Div. 132; *Jones v Maffet (Pa.)* 5 Serg. & R. 523; *Mexican Nat. R. Co. v Ware (Tex. Civ. Ap.)* 60 S.W. 343; *Contra: Chanoine v Fowler*, 3 Wend. (N.Y.) 173.

⁶⁹ *Smith v Blinn*, 221 Ala. 24, 127 So. 155; *Magee v Sanderson*, 10 Ind. 261; *Wilt v Cutler*, 38 Mich. 189; *Free v Southern R. Co.*, 78 S.C. 57, 58 S.E. 952; *Martin v Payne*, 11 Tex. 292. Or under the authority of the state: *Rogero v Zippel*, 33 Fla. 625, 15 So. 326; *Rudolph Hardware Co. v Price*, 164 Iowa 353, 145 N.W. 910; *Bride v Clark*, 161 Mass. 130, 36 N.E. 745. This is in accord with the Uniform Proof of Statutes Act, §§ 1 and 2, which is in force in Alaska, Arizona, Hawaii, Louisiana, Maryland, Michigan, Nevada, Pennsylvania, Tennessee and New York.

⁷⁰ *Pensacola, etc., S.S. Co. v Brooks*, 14 Ala. Ap. 364, 70 So. 968; *Canfield v Squire*, 2 Root (Conn.) 300; *Magee v Sanderson*, 10 Ind. 261; *Goodwin v Provident Sav. Life Assur. Assn.*, 97 Iowa 226, 66 N.W. 98, 24 L.R.A. 473; *Merrifield v Robbins*, 8 Gray (Mass.) 150; *Wilt v Cutler*, 38 Mich. 189; *Packard v Hill*, 2 Wendel (N.Y.) 411; *Free v Southern R. Co.*, 78 S.C. 57, 58 S.E. 952.

and privately published, is admissible.⁷¹ Moreover, statutes frequently provide that the officially printed volumes of a foreign state shall be *prima facie* evidence of the laws of that state.⁷² Such a statute, however, does not prohibit resort to other methods of proof.⁷³ In fact, a foreign law may be sufficiently established if a book purporting to contain such a law is received in evidence without objection.⁷⁴

§ 154. **Proof of Foreign Laws—Parol Testimony.**—Whether oral testimony is admissible, in the absence of statute, to prove the existence and contents of a foreign statute, is a matter upon which there is considerable confusion and conflict. Probably the weight of authority is against the admission of parol evidence for this purpose.⁷⁵ But where it is admissible, the testimony of persons

⁷¹ *Falls v U.S. Sav., etc., Co.*, 97 Ala. 417, 13 So. 25, 24 L.R.A. 174.

⁷² "Printed books or pamphlets purporting on their face to be the session or other statutes of any of the United States, or the territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such state, territory or foreign jurisdiction or proved to be commonly recognized in its courts, shall be received in the courts of this state as *prima facie* evidence of such statutes." Uniform Proof of Statutes Act, § 1. Also see *supra*, note 69.

⁷³ *Biesenthall v Williams*, 62 Ky. 329.

⁷⁴ *Masocco v Schaaf*, 234 Ap. Div. 181, 254 N.Y.S. 439.

⁷⁵ *McNeill v Arnold*, 17 Ark. 154; *McDeed v McDeed*, 67 Ill. 545; *Latterett v Cook*, 14 Ind. 330; *Phillips v Murphy*, 2 La. Ann. 654; *Zimmerman v Helser*, 32 Md. 274; *Raynham v Canton*, 3 Pick. (Mass.) 293; *People v Lambert*, 5 Mich. 349; *Rialto Co. v Miner*, 183 Mo. Ap. 119, 166 S.W. 629; *Central State Bank v Moody* (Mo. Ap.) 40 S.W. (2) 760; *Cook v Chicago, etc., R. Co.*, 78 Neb. 64, 110 N.W. 718; *Emery v Berry*, 28 N.H. 473; *Van Buskirk v Mulock*, 18 N.J.L. 184; *Toulondou v Lachenmeyer*, 31 N.Y. Super. 45; *Wood v Stephens* (Pa.) 1 Serg. & R. 175; *Free v Southern R. Co.*, 78 S.C. 57, 58 S.E. 952; *Martin v Payne*, 11 Tex. 292; *Frederick v Morse*, 88 Vt. 126, 92 Atl. 16. *Contra*: *Mosko v Mathews*, 87 Colo. 55, 284 Pac. 1021; *Biesenthall v Williams*, 62 Ky. 329; *Title Guarantee Co. v Trenton Potteries Co.*, 56 N.J. Eq. 441, 38 Atl. 422. And the rule seems to be the same with reference to the laws of foreign countries: *Robinson v Clifford*, 20 Fed. Cas. No. 11,948; *Pierce v Indseth*, 106 U.S. 546, 27 L.Ed. 254, 1 S.Ct. 418; *Innerarity v Mims*, 1 Ala. 660; *Kermott v Ayer*, 11 Mich. 181; *Charlotte v Chouteau*, 25 Mo. 465; *Cook v Chicago, etc., R. Co.*, 78 Neb. 64, 110 N.W. 718; *Traders Nat. Bank v Jones*, 93 N.Y.S. 768, 104 Ap. Div. 433; *In re Peterson*, 22 N.D. 480, 134 N.W. 751; *Spaulding v Vincent*, 24 Vt. 501. *Contra*: *The Pawashick*, 19 Fed. Cas. No. 10,851; *Line v Mack*, 14 Ind. 330.

learned in the foreign law may be introduced,⁷⁶ although usually there must be a sufficient showing of the reason why primary evidence is not offered.⁷⁷ Such a witness may, however, properly refresh his memory from a copy of the foreign law,⁷⁸ or be permitted to identify a copy of the foreign statute as authentic.⁷⁹

§ 155. Proof of Foreign Laws—Construction.—Since the construction of a statute becomes a part of the law,⁸⁰ if the statute involved is one of a sister state, or a foreign country, the decisions of the courts of that state or country interpreting it⁸¹ may be introduced into evidence to prove the construction placed upon such statute by the courts of its own state,⁸² and the construction thus

⁷⁶ *Chattanooga, etc., R. Co. v. Jackson*, 86 Ga. 676, 13 S.E. 109; *Biesenthall v. Williams*, 62 Ky. 329; *Canale v. People*, 117 Ill. 219, 52 N.E. 310; *Consolidated Real Estate & Fire Ins. Co. v. Cashou*, 41 Md. 59; *Title Guarantee Co. v. Trenton Potteries Co.*, 56 N.J. Eq. 441, 38 Atl. 422. And see 2 Wigmore *Evidence* (2nd—1923) § 1271, 20 Harv. L.Rev. (1907) 575. But such person does not have to be a lawyer. *Hall v. Costello*, 48 N.H. 176. Any qualified witness will suffice. *Eastern Offices v. P. F. O'Keefe Agency (Mass.)* 193 N.E. 837.

⁷⁷ *Raynham v. Canton*, 3 Pick. (Mass.) 293; *Kermott v. Ayer*, 11 Mich. 181; *Geoghegan v. Atlas Steamship Co.*, 10 N.Y.S. 121. Also see *Charlotte v. Chouteau*, 25 Mo. 465; *Vickers v. Faubion (Tex. Civ. Ap.)* 224 S.W. 803.

⁷⁸ *Barrows v. Downs*, 9 R.I. 446.

⁷⁹ *Nashua Sav. Bank v. Anglo-American Land Co.*, 189 U.S. 221, 47 L.Ed. 782, 23 S.Ct. 517.

⁸⁰ See § 184, *infra*.

⁸¹ That is, the highest tribunal of the foreign jurisdiction. *Cristilly v. Warner*, 87 Conn. 461, 88 Atl. 711, 51 L.R.A. (N.S.) 415; *St. Nicholas Bank v. State Nat. Bank*, 128 N.Y. 26, 27 N.E. 849, 13 L.R.A. 241.

⁸² *Dyer v. Smith*, 12 Conn. 384; *Hoes v. Van Alstyne*, 20 Ill. 201; *Rialto Co. v. Miner*, 183 Mo. Ap. 119; *Horton v. Reed*, 13 R.I. 366; *Seiders v. Merchants Life Assoc.*, 93 Tex. 194, 54 S.W. 753; *Lambertson v. Grant*, 94 Me. 508, 48 Atl. 127. And the statements of text-writers may also be resorted to. *Rialto Co. v. Miner*, 183 Mo. Ap. 119, 166 S.W. 629; *Charlotte v. Chouteau*, 25 Mo. 465. Even professional witnesses may be examined in an effort to ascertain this construction. *Charlotte v. Chouteau*, 25 Mo. 465. As to admissibility of parol evidence, generally, see *Kline v. Baker*, 99 Mass. 253; *Consolidated, etc., Co. v. Cashow*, 41 Md. 323.

established should be followed by the court of the forum.⁸³ And the interpretation, like the language of a foreign statute, must be proved like any other fact in the case.⁸⁴

§ 156. **Respective Spheres of the Court and Jury in Regard to Foreign Laws.**⁸⁵—We have already seen that foreign statutes must be pleaded and proved like any other issuable fact.⁸⁶ Most of the authorities regard the issue of whether a foreign statute exists as one for the determination of the jury, or the court sitting as a jury, when the proof consists of the testimony of witnesses in whole or in part.⁸⁷ And the same is equally true with reference to the rule prescribed by such foreign statute.⁸⁸ But where the evidence consists solely of written evidence—duly authenticated copies of statutes, judicial decisions, etc.—their construction is for the court.⁸⁹ So also the court may withdraw the question from the jury where the evidence is not in dispute and consequently permits the drawing of but one reasonable inference.⁹⁰ And, of course, the admissibility of evidence is for the court to determine.⁹¹

⁸³ *Van Matre v Sankey*, 148 Ill. 536, 36 N.E. 628, 23 L.R.A. 665; *Fred Miller Brewing Co. v Capital Ins. Co.*, 111 Iowa 590, 82 N.W. 1023; *Shaw v Postal Tel. Co.*, 79 Miss. 670, 31 So. 222, 56 L.R.A. 486; *American Print Co. v Lawrence*, 23 N.J.L. 590; *St. Nicholas Bank v State Nat. Bank*, 128 N.Y. 26, 27 N.E. 849, 13 L.R.A. 241; *Kulp v Fleming*, 65 Ohio St. 321, 62 N.E. 334; *Mexican Nat. R. Co. v Jackson*, 89 Tex. 107, 33 S.W. 857, 31 L.R.A. 276. Similarly, by a recent decision, the federal courts must follow the law of the state as declared by the legislature or by its highest courts in a decision. *Erie R. Co. v Thompkins (U.S.)* 82 L.Ed. 787.

⁸⁴ *Taylor v Terzia (La.)* 132 So. 781.

⁸⁵ For further treatment, see Chapter XVIII, § 180, *infra*.

⁸⁶ See *supra*, § 147; also *Loewenstein v Mo. State L. Ins. Co.*, 120 Kan. 75, 242 Pac. 123.

⁸⁷ *Panama R. Co. v Pigott*, 254 U.S. 552, 65 L.Ed. 400, 41 S.Ct. 199; *Montgomery Fourth Nat. Bank v Bragg*, 127 Va. 47, 102 S.E. 649, 11 A.L.R. 1034; *Fitzpatrick v International R. Co.*, 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801, and note. And see *Coral Gables v Kretschmer*, 116 N.J.L. 580, 184 Atl. 825. See also notes, 7 Harv. L. Rev. 186 (1893), 10 Harv. L. Rev. 380 (1897), 25 Harv. L. Rev. 480 (1911), 34 Harv. L. Rev. 93 (1920).

⁸⁸ *Ibid.* Also see note in 42 A.L.R. 1449.

⁸⁹ *Tarbell v Grand Trunk R. Co.*, 96 Vt. 170, 118 Atl. 484, 34 A.L.R. 1444, and note. Also see *Inge v Murphy*, 10 Ala. 885; *Lockwood v Crawford*, 18 Conn. 361; *Ely v James*, 123 Mass. 36; *People v Lambert*, 5 Mich. 349; *Charlotte v Chouteau*, 33 Mo. 194; *Willard v Conduit*, 10 Tex. 213; *Union Cent. L. Ins. Co. v Pollard*, 94 Va. 146, 26 S.E. 421, 36 L.R.A. 271.

⁹⁰ See note in 42 A.L.R. 1449.

⁹¹ *Willard v Conduit*, 10 Tex. 213.

Although, as we have stated above, the question of what is foreign law is usually regarded as a question of fact and consequently for the jury to pass upon,⁹² it must be remembered that in determining what the law is, the problem of interpretation is involved. Wigmore, undoubtedly recognizing this fact, states that the proof of foreign law is for the court, "so far as it is a statute, or decisions, experts, or writers resorted to for interpretation; but perhaps for the jury where it is merely unwritten."⁹³ Nevertheless, even though the general rule now is that the proof of foreign law is a fact for the jury, it ought to be one for the court although the cases rarely lay down either rule absolutely."⁹⁴ This view is undoubtedly correct, for the interpretation of a foreign law, whether there are decisions upon it or not, is for the court.⁹⁵ And it is impossible to determine the existence of a foreign law, as well as the time of its effectiveness, without resorting to interpretation. Moreover, if the foreign law is unwritten, it is suggested that the evidence of what the law is, is judicial in character and hence should be addressed to the court rather than the jury. And after all, the proper spheres of the court and the jury might be easier allocated, if we would dispell the confusion which has resulted from the rule that foreign laws will not be judicially noticed but must be proved. It should be remembered that such proof may be made to the court and not necessarily to the jury. In presenting the above views,⁹⁶ De Sloovere concludes by indicating that the proper way to dispose of this problem is to treat the proof of foreign law as a preliminary question of fact—a question always for the jury.⁹⁷ This solution would seem undoubtedly a practical one.

⁹² *Kline v Baker*, 99 Mass. 253. Also see cases under note 87, supra.

⁹³ 5 Wigmore, Evidence § 2558, p. 564, n. 2.

⁹⁴ *Hansen v Grand Trunk Ry.*, 78 N.H. 518, 102 Atl. 625. Also see Wigmore, Evidence § 2558, n. 2.

⁹⁵ See Story, Conflict of Laws (1865) § 638. Also see *Molson's Bank v Boardman* (N.Y.) 47 Hun. 135; *Ames v McCamber*, 124 Mass. 85.

⁹⁶ De Sloovere, Judge and Jury in Statutory Interpretation (1933) 46 Harv. L. Rev. 1086, 1104-6.

⁹⁷ *Ibid.* L.C. 1106.

CHAPTER XVIII

CONSTRUCTION OF STATUTES—GENERALLY

- § 157. Construction and Interpretation Defined and Distinguished.
- § 158. Purpose of Interpretation and Construction.
- § 159. The Legislative Intent and Its Ascertainment, Generally.
- § 160. The Legislative Intent—In General.
- § 161. The Legislative Purpose.
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- § 165. Statutes as a Whole.
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- § 170. The Process of Interpretation—In General.
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- § 174. The Construction of Unambiguous Statutes.
- § 175. A Suggested Mode of Interpretation.
- § 176. The Value of Precedents and Principles of Construction.
- § 177. The Effect of the Statute.
- § 178. The Spirit and Reason of the Law.
- § 179. Equitable Construction.
- § 180. Who May Exercise the Power of Construction—In General.
- § 181. The Court and Jury.
- § 182. Rules for Ascertaining Questions for the Jury.
- § 183. Evidence of the Meaning of Words and Phrases—To Whom Addressed.
- § 184. Effect of Construction or Interpretation on the Law—Stare Decisis.

§ 157. **Construction and Interpretation Defined and Distinguished.**—Strictly speaking, construction and interpretation are not the same,¹ although the two terms are often used interchangeably.²

¹ U.S. v Wiltberger, 5 Wheat. (U.S.) 76, 5 L.Ed. 37; Mercantile Trust Co. v Adams, 95 Ark. 333, 129 S.W. 1101; Deane v State, 159 Ind. 313, 64 N.E. 916; Jones v Proprietors of Morris Aqueduct, 36 N.J.L. 206; Peo. v Commrs. of Taxes, 95 N.Y. 554. "In support of the second ground, it is insisted that the construction of a statute is one thing and its interpretation another and different thing. That abstractly there may be a difference between the two terms is not denied in argument by the United States, and finds support in works of respectable authority." United States v Keitzel, 211 U.S. 370, 29 S.Ct. 123, 53 L.Ed. 230.

² U.S. v Keitzel, 211 U.S. 370, 53 L.Ed. 320, 29 S.Ct. 123. Also see: An Introduction to the Science of Law—Kocourek, § 41, p. 191.

Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text, from elements known and given in the text,³ while interpretation is the process of discovering the true meaning of the language used.⁴ Thus, the court will resort to interpretation when it endeavors to ascertain the meaning of a word found in a statute, which when considered with the other words in the statute, may reveal a meaning different from that apparent when the word is considered abstractly or when given its usual meaning.⁵ But when the court goes beyond the language of the statute and seeks the assistance of extrinsic aids in order to determine whether a given case falls within the statute, it resorts to construction.⁶ The process to be used in any given case will depend upon the nature of the problem presented. And, as is apparent, both processes may be used in seeking the legislative intent in a given statute. If the legislative intent is not clear after the completion of interpretation, then the court will proceed to subject the statute to construction.⁷

The distinction, however, between the two processes is often vague, and so far as the courts are concerned apparently has little or no importance.⁸ Generally, the whole matter has been largely relegated to the realm of academic discussion, since for most practical purposes it is sufficient to designate the whole process of ascertaining the legislative intent as either interpretation or construction. This appears to be the customary judicial practice.⁹ But by breaking the process of finding the legislative intent into these two proc-

³ U.S. v Farenholt, 206 U.S. 226, 51 L.Ed. 1036, 27 S.Ct. 123; People v Comrs. of Taxes, 95 N.Y. 554. Also see Lieber, Hermeneutics, pp. 11, 43-44, or the quotation therefrom in Sedgwick, Stat. Constr. (2nd Ed.) p. 191.

⁴ Bloomer v Todd, 3 Wash. T. 599, 19 Pac. 135, 1 L.R.A. 111.

⁵ Anderson v City of Hattiesburg, 131 Miss. 216, 94 So. 163.

⁶ Union Trust Co. v McGinty, 212 Mass. 205, 98 N.E. 679.

⁷ See 2 Williston, Contracts (1920) 1160-1161. But note the following: "Interpretation is the meaning of a fact. As applied in the law, interpretation is ascertainment always of a complex fact such as the meaning of a custom, of a judicial decision, of a statute, of a regulation, of a contract or of a will. The method by which interpretation is reached is construction. Construction therefore is the means of interpretation and interpretation is the end. These definitions are not settled in usage. Thus, it may be found what here is called 'interpretation' is also called 'construction' and vice versa." An Introduction to the Science of Law—Kocourek, § 41, p. 191.

⁸ U.S. v Keitzel, 211 U.S. 370, 53 L.Ed. 320, 29 S.Ct. 123.

⁹ Ibid.

esses whose characters depend upon whether the court, strictly speaking, interprets or constructs the legislative enactment at hand, some light is shed upon how the courts exercise the judicial function of ascertaining the legislative intention.¹⁰

The difficulty in distinguishing between interpretation and construction further appears when we consider the various methods of interpretation. While the process of interpretation or construction is considered in detail further on,¹¹ a brief summary of the most widely recognized methods will illustrate our point.

Gray says that "interpretation is of two kinds, grammatical and logical. Grammatical interpretation is the application to a statute of the laws of speech; logical interpretation calls for comparison of the statute with other statutes and with the whole system of law, and for the consideration of the time and circumstances in which the statute was passed."¹² Interpretation has also been divided into genuine and spurious.¹³ The former has as its object the discovery of the rule which the law-makers intended to establish, the discovery of the intention with which the lawmakers made the rule, or the sense which they attached to the words wherein the rule is expressed, while the object of the latter is to make, unmake, or remake, and not merely to discover.¹⁴ Spurious interpretation has been referred to as "judicial law-making under the guise of interpretation."¹⁵ Genuine interpretation, on the other hand, is purely judicial in character.¹⁶

Probably no problem in the whole realm of statutory construction is more difficult than to know exactly where "genuine inter-

¹⁰ For an analysis of the process of ascertaining the legislative intent, see § 170, *infra*.

¹¹ *Ibid.* For enumeration of various methods of interpretation, see Black, *Int. L.* (2nd Ed.) pp. 5-9, and *An Introduction to the Science of Law*—Kocourek, § 41, p. 200.

¹² Gray, *The Nature and Sources of the Law* (2nd Ed.—1921) 176-178. For other methods, see Lieber, *Hermeneutics*, 54-60.

¹³ Austin, *Jurisprudence* (3rd Ed.) 1023; also see Pound, *Spurious Interpretation* (1907) 7 *Col. L.Rev.* 379-382.

¹⁴ Pound, *Genuine and Spurious Interpretation*, 7 *Am. Pol. Sci. Rev.* 361, reprint, 77 *Central L. Journal* 219, and Spencer, *Genuine and Spurious Interpretation* (1913) 25 *Green Bag* 504.

¹⁵ *Ibid.*

¹⁶ *Ibid.* And see Pound, *Spurious Interpretation* (1907) 7 *Col. L.Rev.* 379-382. Also see Pound, *Enforcement of Law*, 20 *Green Bag*, 401, from which the theories of interpretation hereafter discussed are mainly taken.

pretation" ends and "spurious interpretation" starts. But the scope of each depends upon our conception of the interpretative process; under some theories "genuine interpretation" is closely confined; under others, it is quite extensive. Thus, under the analytical theory, the human element is excluded, and the process and the result are regarded as purely logical and scientific. Justice in the case at hand is not the chief end; the result is to always be labeled justice. Uniformity of decision in like cases and the existence of knowledge in advance, are the theory's chief objects. Obviously, under this conception, the limits of "genuine interpretation" are closely confined. The same is equally true with reference to the historical theory of construction, under which existing law is considered as the continuation and development of pre-existing law, so that the court, after going into the history of the legislative act at hand, merely has to determine whether the case falls within the rule thus ascertained. The process is regarded as purely logical, and ethical considerations play no part in the court's decision.

Under the equitable or philosophical theory of interpretation, the bounds of "genuine interpretation" are considerably extended. The legislative enactment, according to this theory, merely lays down a general guide and leaves the court wide leeway within which to deal with individual cases as the justice of the case demands in the light of the reason and moral sense of men generally. Accordingly, the court will use the statute applicable to the case in hand as a general guide, but the ethical situation among the litigants will be the determining factor. Justice in the pending controversy is the court's prime object, and such is also the basic legislative intent in all legislation. It may be assumed that the legislators in enacting all legislative acts, intend to delegate to the courts the power to determine each case on its own equitable merits. At least, in the absence of a specific intent, may it not be assumed that the law-makers intended that the statute in question should promote justice? It is difficult to see how this action upon the part of the court amounts to the exercise of legislative power, or constitutes "spurious interpretation," unless one adopts a straight-laced conception of the true nature of judicial power. In fact, it seems logical to assume that the court is simply exercising judicial power when it determines the pending controversy according to the ethical situation *inter partes*.

But be that as it may, ethics cannot be cast aside. As Dean Pound has so ably stated: "In general, law cannot depart far from ethical custom nor lag far behind it. For a law does not enforce itself. Its machinery must be set in motion and kept in motion by individual human beings; and there must be something more than the abstract content of the legal precept to move these human beings to act and to direct their action". If the courts would refuse to take into consideration the ethical situation existing in the pending controversy, and merely regard their duty the application of a rigid rule to a set of facts, regardless of its consequences, one might wonder how long our legal system would exist. Legislatures cannot legislate so that every conceivable future controversy can be decided equitably through the strict application of the legislative enactment apparently applicable. The best they can do is to lay down a general rule or guide or policy, and leave to the courts the duty of dealing with specific cases according to the ethical considerations involved, where the statute is not precise enough to cover the problem before the court. Perhaps for the lack of a better designation of this action of the court, the term "ethical interpretation" is more adequate and appropriate than "spurious interpretation".

§ 158. Purpose of Interpretation and Construction. — The object or purpose of all construction or interpretation is to ascertain the intention of the lawmakers,¹⁷ and to make it effective.¹⁸ The basic principle has been announced time after time that if the statute is plain, certain and free from ambiguity, a bare reading

¹⁷ *Parsons v Circuit Judge*, 37 Mich. 287; *In re Costello's Estate (Mo.)* 92 S.W. (2) 723; *People v Comm. of Taxes*, 95 N.Y. 554. Also see, *Illinois Cent. R. Co. v People*, 143 Ill. 434, 33 N.E. 173, 19 L.R.A. 119; *Carson v Bradshaw*, 160 Iowa 296, 141 N.W. 1062; *In re Intox. Liquor Cases*, 25 Kan. 751; *State v Shevlin-Carpenter Co.*, 99 Minn. 158, 108 N.W. 935; *Shellenberger v Ransom*, 41 Neb. 631, 59 N.W. 935, 25 L.R.A. 564; *State v Taylor*, 33 N.D. 76, 156 N.W. 561; *State v So. Kingstown*, 18 R.I. 258, 27 Atl. 599, 22 L.R.A. 65; *Kitchen v Southern Ry. Co.*, 68 S.C. 554, 48 S.E. 4; *Ezell v Tipton*, 150 Tenn. 300, 264 S.W. 355; *Imperial Irrig. Co. v Jayne*, 104 Tex. 395, 138 S.W. 575; *Wait v Pierce*, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822, 84 A.L.R. 276.

¹⁸ *Baxter v McGee (C.C.A.—Ark.)* 82 Fed. (2) 695; *Illinois Bell Tel. Co. v Ames*, 364 Ill. 362, 4 N.E. (2) 494; *O'Malley v Continental L. Ins. Co. (Mo.)* 75 S.W. (2) 837.

suffices and interpretation is unnecessary.¹⁹ Or stated conversely, if the statute is ambiguous, or its meaning uncertain, interpretation is required in order to ascertain what the legislators meant. But interpretation may be required and justified by various factors. Besides the doubt created by the doubtful meaning of words and phrases, there are other instances where the words used do not express the legislative intent perfectly, in which interpretation is needed. Such is the case where the language used exceeds or falls short of expressing the meaning intended.²⁰

But it makes no difference what causes the legislative intent to be obscure, for in every instance, the only legitimate object of construction is to ascertain that intent and to give it effect.²¹ If the courts were permitted to ignore the expressed intent of the legislature, they would invade the province of the legislature and violate the tri-partite theory of government.²² The legislature would become a nonentity. Legislative power would in fact be wielded by the judiciary. The courts would actually make the laws. But where the courts follow the principle that the true object of construction is to ascertain the legislative intent, that intent designates the scope and extent of the law. Theoretically and legally, the courts are bound by that intention. In discovering it, they are not exercising legislative power. Consequently, they should not rewrite a statute but should ascertain the legislative intent therefrom, through the application or use of rules of common sense.²³

§ 159. The Legislative Intent and Its Ascertainment — Generally.—In the construction and interpretation of statutes, the intent of the legislature is of supreme importance. The statement has been

¹⁹ *Helvering v St. Louis S. Ry. Co.* (C.C.A.—8th) 84 Fed. (2) 857; *People v Comm. of Taxes*, 95 N.Y. 554; *U.S. v Hartwell*, 6 Wall. (U.S.) 395, 18 L.Ed. 830; *U.S. v Wiltberger*, 5 Wheat. (U.S.) 76; *Ruggles v Illinois*, 108 U.S. 526; *Fitzpatrick v Gebhart*, 7 Kan. 35; *McCluskey v Cromwell*, 11 N.Y. 601; *Coffin v Rich*, 45 Me. 507; *Cearfass v State*, 42 Md. 403; *Koch v Bridges*, 45 Miss. 247; *Water Comm. v Brewster*, 42 N.J. 125. But see § 174, *infra*.

²⁰ *People v Comr. of Taxes*, 95 N.Y. 554. Also see *River Wear Comm. v Adamson*, L.R. 2 Ap. Cas. 743.

²¹ "It is the object of all interpretation and construction of statutes to ascertain the intention of the lawmakers" . . . *People v Comr. of Taxes*, 95 N.Y. 554, 559.

²² *Spencer v State*, 5 Ind. 41.

²³ *Attorney General ex rel Connolly v Reading*, 268 Mich. 224, 256 N.W. 432. Also see *State v Miller*, 90 Kan. 230, 133 Pac. 873.

made, in the preceding section, and it may also be found in innumerable cases, that the ascertainment of the legislative intent is the sole legitimate purpose of construction. Consequently, several inquiries become pertinent. What is the legislative intent? Is it a thing that actually exists? Is it something which can be ascertained or discovered? And, if capable of ascertainment, how do we know when we have discovered it? The answer to these inquiries will not only reveal something of the nature of the process of interpretation but will also show in a general way the relative values of the various rules and principles of interpretation, especially from the standpoint of their usefulness and effectiveness.

§ 160. The Legislative Intent — In General. — As we have already stated, the intention of the legislature as embodied in the statute constitutes the law thereof.²⁴ It is the essence of a statute.²⁵ Neither of these, however, for the purposes of this treatise constitute a sufficient or satisfactory definition. We must delve deeper. We must seek to break the legislative intent into its constituent elements, if possible. At least, we must free the expression from any meaning or concept which may shade, obscure, or completely hide its true nature.

Unfortunately, the word “intent” includes two concepts—that of purpose and that of meaning.²⁶ As a result, the courts sometimes announce that they are striving to find the legislative purpose. Of course, in many cases, the court will endeavor to ascertain the legislative purpose, but, as we will see hereafter,²⁷ only as a step in the

²⁴ U.S. v Hartwell, 6 Wall. (U.S.) 385, 18 L.Ed. 830; Raymond v Thomas, 91 U.S. 712, 23 L.Ed. 434; Jones v N.Y. Guaranty Co., 101 U.S. 622, 25 L.Ed. 1030; State v Walton, 93 Fla. 796, 112 So. 630; People v Patton, 338 Ill. 385, 170 N.E. 280, rev. 254 Ill. Ap. 7; Uphoff v Industrial Board, 271 Ill. 312, 111 N.E. 128; Oliphant v Hawkinson, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; Cheney v Cheney, 110 Me. 61, 85 Atl. 387; Edwards v Morton, 92 Tex. 152, 46 S.W. 792; In re Meyer, 209 N.Y. 386, 103 N.E. 713. And see Kaiser v Hopkins (Calif.) 58 Pac. (2) 1278, that the courts will interpret a measure adopted by the people so as to give effect to the intent of the voters in adopting it. Also see *infra*, §§ 160-163, for discussion of the intent problem.

²⁵ Watson v Clayton (Ala.) 159 So. 481.

²⁶ Landis, J. M., A Note On Statutory Interpretation (1930) 43 Harv. L.Rev. 886-893.

²⁷ See § 161, *infra*.

process of discovering the legislative intent. And it is perhaps possible that the legislative intent and the legislative purpose may coincide. Moreover, so far as legislation is concerned, the lawmakers may have several purposes in mind when they enact a given law.²⁸ But to be technically accurate, in any case, does not the court always seek the legislative meaning as its ultimate goal? ²⁹

§ 161. The Legislative Purpose.—Naturally, the legislative purpose is the reason why the particular enactment was passed by the legislature.³⁰ Perhaps the reason was to remedy some existing evil,³¹ or to correct some defect in existing law,³² or to create a new right or a new remedy.³³ Consequently, in seeking to ascertain the legislative purpose, the court will resort, among other things, to the circumstances existing at the time of the law's enactment, to the

²⁸ *Idaho Falls v Pfof*, 53 *Ida.* 247, 23 *Pac.* (2) 245.

²⁹ See § 162, *infra*. "It is the duty of the courts to endeavor by every rule of construction to ascertain the meaning . . ." *State ex rel Union Electric Light & Power Co. v Baker, et al*, 316 *Mo.* 853, 293 *S.W.* 399. "Where the language of a statute is such that its meaning cannot be determined with certainty by looking at the language alone, it is allowable to give some weight to those general considerations of public policy which we may presume that the legislature had in mind at the time of the enactment." *Smith v Sioux City Stock Yards Co. (Iowa)* 260 *N.W.* 530. "It is very usual to speak of the intention of the parties to a contract, of the intention of a testator, the intention of one who commits a tort or a crime, and also the intention of the legislature. The term 'intention' in its subjective meaning is irrelevant in each one of these instances. In each case it stands as an awkward verbal symbol for what is done. The relevant question is not what did the legislature intend? but what did the legislature say (do)?" *Kocourek—An Introduction to the Science of Law*, § 41, p. 200.

³⁰ *Tinker v Modern Brotherhood of America*, 13 *Fed.* (2) 130.

³¹ "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy." *Church of the Holy Trinity v U.S.*, 143 *U.S.* 457, 12 *S.Ct.* 511, 36 *L.Ed.* 226. Also see *Fasulo v United States*, 272 *U.S.* 620, 47 *S.Ct.* 200, 71 *L.Ed.* 443: "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language of the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

³² *In re School District (Mich.)* 278 *N.W.* 792.

³³ *Thompson v Thompson*, 218 *U.S.* 611, 31 *S.Ct.* 111, 54 *L.Ed.* 1180.

necessity for the law and the evil intended to be cured by it, to the intended remedy, to the law prior to the new enactment, and to the consequences of the construction urged.³⁴

But these various indications of the legislative purpose do not directly reveal the legislative intent or meaning but simply why specific legislation was enacted. Nevertheless, as is apparent, the ascertainment of the legislative purpose or purposes, if there be several, is, or may be a step in the process of ascertaining the legislative intent or meaning, since the reason for the enactment of a law must necessarily shed considerable light on "the law of the statute," that is, on the legislative intent,³⁵ for if the legislators sought to effect a certain purpose, naturally such purpose should reveal or tend to reveal the meaning of the language used by the lawmakers. And even where the meaning of the statute seems clear, the ascer-

³⁴ U.S. v Ninety-Nine Diamonds, 139 Fed. 961, 72 C.C.A. 9; Henry v McCormack Motor Co. (Ala.) 167 So. 256; City of Phoenix v Drinkwater (Ariz.) 52 Pac. (2) 1175; Marquette Third Vein Coal Co. v Allison, 132 Ill. Ap. 221; State v Barrett, 27 Kan. 213; Common. v Trent, 117 Ky. 34, 77 S.W. 390; Richard v Lazard, 108 La. 540, 32 So. 559; Pembroke v Huston, 180 Mo. 627, 79 S.W. 470; Decker v Diemer, 229 Mo. 296, 129 S.W. 936; Croomer v State, 40 Tex. Cr. 672, 51 S.W. 924; State v Peet, 80 Vt. 449, 68 Atl. 661; Daniel v Simms, 49 W.Va. 554, 39 S.E. 690; Wellsburg v Panhandle Traction Co., 56 W.Va. 18, 48 S.E. 746, and see Kaufman v Carter, 67 S.C. 312, 45 S.E. 211. It should be presumed that the legislature intended the most beneficial construction. Richards v Dagget, 4 Mass. 534.

³⁵ "In construing a statute, the primary purpose is to ascertain the intention of the legislature, and, while such intention must be gathered from the words used, it is proper to consider the purpose of the enactment and the object to be accomplished." Patterson Pure Food Pie Co. v Industrial Commission, 335 Ill. 476, 167 N.E. 86, 87. "The first and most important aid to the ascertainment of the legislative intent is, of course, the words employed. When these are plain of meaning the statute needs no interpretation. It interprets itself. If the words be of doubtful meaning; if they be inartistically arranged; if the syntax be violative of the rules of composition; if illyssis, tautology or redundancy occur, the statute must be examined in other lights than those afforded by the mere words employed, and chief among these lights are those afforded by the evident purpose and intent of the legislature." Landrum v Flannigan, 60 Kan. 436, 56 Pac. 753. "The intention is to be sought in the language employed and the apparent purpose to be subserved." State ex rel Vickers v Board of Commissioners, 77 Mont. 316, 250 Pac. 606, 608. "We must be controlled by the evident purpose of the legislature in view of the object sought to be attained." State v Navaro, 83 Utah 6, 26 Pac. (2) 955. And note Surace v Danna, 248 N.Y. 18, 161 N.E. 315, that the legislative purpose is a sign-post of the intention of the legislature.

tained purpose may corroborate or confirm a particular asserted construction or the one apparent on the statute's face.³⁶

Consequently, when construing a statute, the reason for its enactment should be kept in mind,³⁷ and the statute should be construed with reference to its intended scope and purpose.³⁸ The court should seek to carry out this purpose rather than to defeat it.³⁹ Of course, if the language is unambiguous and the statute's meaning is clear, the statute must be accorded the expressed meaning without deviation,⁴⁰ since any departure would constitute an invasion of the province of the legislature by the judiciary.⁴¹ And even where the statute is ambiguous, considerable caution should be exercised by the court lest its opinion be substituted for the intent of the legislature.⁴² In other words, the court must not ascribe to the law-makers a purpose not actually that of the legislature. To do so

³⁶ *Boston Sand & Gravel Co. v U.S.*, 278 U.S. 41, 73 L.Ed. 170, 49 S.Ct. 52, aff. 19 Fed. (2) 744, and mod. 16 Fed. (2) 643; *Hepburn v Griswold*, 8 Wall. (U.S.) 603, 19 L.Ed. 513. Also note *Maxwell v Brayshaw*, 258 Fed. 957.

³⁷ *Nicoli v Briggs* (C.C.A.—Kan.) 83 Fed. (2) 375.

³⁸ *U.S. v Jackson*, 143 Fed. 783, 75 C.C.A. 41; *Robertson v Dink Bros.*, 143 Ill. Ap. 391; *In re Intoxicating Liquor Cases*, 25 Kan. 751; *State v Mayberry*, 48 Me. 218; *Fosburgh v Rogers*, 114 Mo. 122, 21 S.W. 82, 19 L.R.A. 201; *People ex rel Wood v Lacombe*, 99 N.Y. 43, 1 N.E. 599; *Davis v State*, 134 Wis. 632, 115 N.W. 150. A good illustration of the application of this principle may be found in *Harris v Rhodes*, 234 Ky. 546, 28 S.W. (2) 757, where the statute involved provided that on the first violation of the prohibition act, the court shall require the defendant "to execute a bond in such a sum not less than \$1,000 nor more than \$5,000, to be of good behavior," and the court construed the statute to mean a bond with sureties, since the legislature undoubtedly knew that a majority of defendants are insolvent, so that a bond executed without securities would have no restraining value.

³⁹ *School District of Omaha v Gass* (Neb.) 267 N.W. 528.

⁴⁰ *Southern Ry. Co. v Machinists Local Union*, 111 Fed. 49; *Atlantic Coast Line R. Co. v U.S.*, 168 Fed. 175, 94 C.C.A. 35.

⁴¹ *Atlantic Coast Line R. Co. v U.S.*, 168 Fed. 175, 94 C.C.A. 35; *Waldharber v Lunkenheimer*, 32 Ky. L. 1221, 108 S.W. 327; *Estate of Tichnor*, 13 Mich. 44; *Charleston v Charleston Brew. Co.*, 61 W.Va. 34, 56 S.E. 198.

⁴² *Attorney General v Parsell*, 100 Mich. 170, 58 N.W. 839; *Roberts v Cannon*, 20 N.C. 398.

would result in ascribing to the statute a different intent than that of the legislature.

§ 162. **The Legislative Meaning.**—Strictly speaking, the legislative meaning is meant when the courts state that the legislative intent is the essence or the law of the statute. Hence, obviously the legislative purpose could not constitute the law, for, as we have already stated,⁴³ the legislative purpose is merely the reason for the law's enactment. Inasmuch as the legislative intent and the meaning of the statute are synonymous, the primary purpose of construction is to ascertain what the legislature meant by the use of the language contained in the statute.⁴⁴ At least, the meaning directly reveals the legislative intent, if the two are not identical. While the legislative purpose is instrumental in determining what the statute's construction shall be by indicating the meaning of its language, the meaning thus reached reveals what was intended by the lawmakers. But whether we accept this analysis or not, it is important that we always distinguish between the legislative purpose and the legislative intention.

Considerable light may be shed upon the difference between the legislative meaning and the legislative purpose by considering a specific statute. For instance, the lawmakers may enact a statute which shall make it unlawful for one to operate a motor vehicle upon a public highway while the driver is in an intoxicated condition. Undoubtedly, the purpose of such a statute is to protect the public in the use of the highways by preventing their use by drunken drivers. But is that the meaning of the statute? The meaning of the statute must be determined by the meaning of the language used. Would this statute include a motorcycle, a street in an incorporated city, or a person under the influence of narcotics? Or more specifically, what does the word "motor-vehicle" mean? What

⁴³ *Supra*, § 161.

⁴⁴ "In determining the true meaning and scope of constitutional or statutory provisions, the intent and purpose of the lawmakers is of primary importance." *Graves v Purcell*, 337 Mo. 574, 85 S.W. (2) 543, 547. But the legislature may have a primary as well as a subordinate aim; if so, the latter, where inconsistent with the primary intent, must yield to the primary intent, and local wishes must yield to general state wide policies. *State v Dixon*, 215 N.C. 161, 1 S.E. (2) 161.

does the term "public highway" mean? Consequently, should the driver of a motorcycle be arrested under the above statute for riding it over the streets of a city while he was under the influence of narcotics, a consideration of the purpose of the statute would probably lead the court to find him within the scope of the statutory prohibition, unless the statute be subjected to a strict construction. But the court in construing the statute would not be simply seeking to find its purpose, as the purpose is perhaps obvious.⁴⁵ On the contrary, it would have as its ultimate aim, the discovery of whether the legislature meant to include this particular defendant, that is, whether "motor-vehicle" would include a motorcycle, and "public highway" include a street.⁴⁶

§ 163. Is There a Legislative Intent?—There has been considerable discussion concerning the actual existence of an intention upon the part of the legislature. In a general way, there seem to be three views.

According to one view, it is apparently claimed, and quite convincingly argued, that there is no such a thing as a collective legislative intent:

"A legislature certainly has no intention whatever in connection with words which some two or three men drafted, and

⁴⁵ Indeed, the statute may expressly set forth the purpose or purposes for which it was enacted. *State v Redmon*, 134 Wis. 89, 114 N.W. 137, 14 L.R.A. (N.S.) 229. But even where the statute contains a clear statement of the legislative purpose, it may nevertheless require construction in order to ascertain its meaning. *Atlantic Coast Line R. Co. v U.S.*, 68 Fed. 175. Does not this conclusively show that the legislative purpose and the legislative meaning are separate and distinct?

⁴⁶ For a somewhat similar case, see *McBoyle v U.S.*, 283 U.S. 25, 51 S.Ct. 34, 75 L.Ed. 618, where the problem arose whether an airplane was included within the term "self-propelled vehicle". Also see *Taylor v Goodwin*, L.R. 4 Q.B. Div. (Eng.) 228, that a bicycle was a "carriage" within the statute imposing a penalty for immoderate driving.

in regard to which many of the approving majority might have had, and demonstrably did have, different ideas and beliefs.”⁴⁷

⁴⁷ Radin, Max—Statutory Interpretation (1930) 43 Harv. L.Rev. 863-885. Also see Sedgwick, Construction of Statutes (2nd Ed.) p. 328: “What is the legislative intent? In seeking for an answer, many things are to be considered. In the first place, the intention is to be found in the acts of the majority, and the objects or purposes of those voting against the bill, are to be left out of view. Of those who voted for the bills, how many considered the precise question . . . Again, if the clause be inserted by amendment, is the majority who voted for the amendment, the same as the majority who voted for the bill? Amendments are very frequently voted for by members hostile to a bill, for the purpose of defeating it, and yet the bill passes. Again, a committee reports a bill with one object, and it is completely or partially altered by amendments in its passage through the legislative body. These considerations, moreover, apply to two bodies, thereby doubling the difficulty of arriving at the real intention of the law-making power.

Illustrations of this kind might be extended almost indefinitely. They appear to me to be quite sufficient to show that even if the utmost latitude of proof was allowed, if reports and journals were consulted, if even the members themselves were put on the stand, it would be utterly impossible in the great majority of cases to prove what the intent of the legislative body actually was in framing or inserting any given particular clause or provision.

These considerations are not without practical weight. They go to show the only safe rule to be, that the legislative intent must be taken as expressed by the words which the legislature has used, that all attempts by any kind of evidence to get at a legislative meaning different from that embodied in the words of the enactment, would from the nature of things prove illusory and vain . . .”

“Legislation is group activity and it is impossible to conceive a group mind or group celebration. It is impossible to trace in the legislative result, in any reliable way, the individual state of mind of the various legislators at any given moment. Legislation is an objective phenomenon in which all subjective antecedents are irrevocably lost. Use of the expression ‘intention of the legislature’ is misleading and entirely unnecessary. No court ever seeks actually to find it; indeed, it is, as already shown, quite impossible to know it, since it never existed.” Kocourek, *An Introduction to the Science of Law*, § 41, pp. 201-202.

And this view finds support in several decisions.⁴⁸ Thus, in *Barlow v Jones*,⁴⁹ an attempt was made to introduce the testimony of a member of the legislature which had enacted the statute involved and the court held such testimony incompetent partly on the ground that "it is not conceivable that a common intent would be the result" even if the testimony of every member of the legislature could be produced. Similarly, in *Badeau v United States*,⁵⁰ where an attempt was made to prove by a member of the legislature what the legislative intent was, the court said that the legislator could not possibly have any personal knowledge of the object or intention of the enactment, and that at most he could have only personal knowledge of his own object and intention and that would not go far toward showing the object and intention of each house of the legislature or of a majority of the several hundred members of each house in passing the statute in issue.

Most cases blandly recognize the existence of a legislative intention. They do this when they announce the general principles of construction, such as that the primary purpose of construction is to ascertain the legislative intent, and that the intent of the legislature constitutes the law of the statute. To the courts following this procedure, the existence of a legislative intention is conclusively presumed, and the only problem is to discover it. After all, perhaps this attitude is the proper and most practical one.

Nevertheless, it is not necessarily impossible or inconceivable that the legislature possess a collective intent. Undoubtedly, in many instances, such an intent is a reality. And simply because the statute may have been drafted by several legislators and passed by

⁴⁸ *Barlow v Jones*, 37 Ariz. 396, 294 Pac. 1106; *Commonwealth v West Philadelphia Fidelity Mannerchor*, 115 Pa. Super. 241, 175 Atl. 434; *Delaplane v Crenshaw & Fisher (Va.)* 15 Grat. 457, and *Badeau v U.S. (U.S.)* 21 Ct. Cl. 48. And note the following from *Hilder v Dexter (Eng.)* A.C. 474: "My Lords, I have more than once had occasion to say that in construing a statute, I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps it was not done."

⁴⁹ 37 Ariz. 396, 294 Pac. 1106.

⁵⁰ 21 Ct. Cl. (U.S.) 48.

a score or more of them does not necessarily negative the existence of a common intent. A group of men may have a common purpose in mind, and in order to achieve that purpose, they may collectively set up a plan, understood by each member of the group, and designed to accomplish certain things. At least, that they might have a common general intent, seems beyond contradiction.

Accordingly, a third view assumes the attitude that while the lawmakers collectively may not have an intention expressed in unequivocal terms upon specific statutory provisions, a general legislative intent in statutes of general public concern is at times discoverable.⁵¹ In most instances, it is probably true that when a given statute is enacted, the legislature does not consciously consider every possible situation which may arise under it. Yet it is difficult to see how any statute could be enacted without the legislature having a general collective intent—an intent wide enough in its scope to include an intention to deal with, or to exempt practically any situation that might arise. As we have stated already, most, if not all legislation, is the result of a general legislative purpose. Such a purpose does shed light upon the legislative intent. If from a consideration of the debates and committee reports and other similar extraneous matters, a collective or general legislative purpose can be shown to exist, may it not be presumed that the legislature collectively intended that the statute convey that meaning which will accomplish this collective purpose?⁵² Moreover, to deny the existence of a legislative intent would seem to imply upon the part of our legislators a neglect of legislative duties and responsibilities.^{52a} Such a denial would also seem to conflict with the many presump-

⁵¹ Horack, F. J., Jr.—In *The Name of Legislative Intention* (1931) 38 W.Va. Law Quart. 101.

⁵² See § 177, *supra*. "A statute is an act of the legislature as an organized body. It expresses the collective will of that body . . ." *State v Partlow*, 91 N.C. 550. "But their intentions must be ascertained by their acts alone, and not by evidence aliunde. We cannot possibly know the intentions of members of the legislature: It is the will of the aggregate body, as expressed in the statutes which they pass, which can be regarded as having the force of law. Any different construction would lead to the greatest confusion and uncertainty." *Shaw, C. J., in Common. v Churchill (Mass.)* 2 Metc. 118.

^{52a} "Judicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." *Field v Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294.

tions which operate to make our legal system practical—that common words are presumed to carry their ordinary meanings and technical words to carry their technical meanings, and that the law-makers are presumed to know the previous state of the law, to enumerate a few examples. To adhere to the view that a general collective legislative intent is “a futile bit of fiction” would recognize, at least impliedly, that statutes enact no law except as the courts determine or permit. If there is no ascertainable legislative intent, what then is the part played by the legislature in our system of government?

After all, in most instances, the real difficulty lies in determining what is the legislative intent rather than in determining whether one exists. Generally, such an intent may be presumed to exist, for it is not a common occurrence to find legislation which is wholly meaningless. More often the statute may appear to have more than one meaning. Such a condition may be due to the inability of the interpreter to grasp the legislative meaning rather than to the lack of a definite meaning on the part of the lawmakers. It is likely that the legislators at the time the statute was passed had a pretty exact idea of what the statute meant. At least, they were in a position to have a clear knowledge of the statute's meaning, which is generally more than can be said with reference to those called upon to interpret the law months or years later, especially where resort to the debates and committee reports is not allowed. Words which later seem ambiguous, at the time the law was enacted most likely were understood to be used in a certain sense. Legislatures are composed of men with various views. One may properly assume that each member sought to promote and to protect his belief, and consequently watched the language employed carefully. Surely, the resulting legislation represents the composite views of all the members of the legislature⁵³—or at least, the views of those voting in favor of the statute—particularly where the statute involves a question of great public interest. The language of the statute is, of course, the reservoir of the legislative intent.⁵⁴ But the difficulty

⁵³ “The Legislature's intention can only be shown by its vote.” *Davis v Childers*, 181 Okla. 468, 74 Pac. (2) 930, 933. Also see *Badeau v United States*, 21 Ct. Cl. (U.S.) 48, that “the law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself.”

⁵⁴ See § 159, *supra*.

in ascertaining this intent in many cases with any convincing assurance of its existence, has undoubtedly led to the assertion or belief that it does not exist. But whether a collective legislative intent exists or not, we must recognize or assume its existence as a matter of fact. Such an assumption or existence is necessary in order for a statute to express the legislative will. After all, a statute is more than a group of words, phrases and sentences. It has a meaning. And the meaning must be one intended by the law-makers or the law-makers do not legislate.

§ 164. **Source of the Legislative Intent, Generally.**—Since the legislature must express its intention by a written statute, that intention, in any instance, must primarily be ascertained from the language used in the statute itself,⁵⁵ and not from conjectures *abunde*.⁵⁶ In other words, before the court can resort to any other source for assistance, it must first seek to find the legislative intention from the words, phrases and sentences which make up the statute subject to construction. If the meaning of the language of the statute is plain, then according to the rule announced in enumerable cases, there is really no need for construction as the legislative intention is revealed by the apparent meaning, that is,

⁵⁵ *Emery-Bird v Williams*, 98 Fed. (2) 166; *U.S. v Ninety-Nine Diamonds*, 139 Fed. 961, 72 C.C.A. 9; *U.S. v Goldenberg*, 168 U.S. 95, 18 S.Ct. 3, 42 L.Ed. 394; *Steber v State (Ala.)* 155 So. 706, cert. den. 155 So. 708; *Ex parte Goodrich*, 160 Calif. 410, 117 Pac. 451; *Maryland Cas. Co. v Sutherland (Fla.)* 169 So. 679; *Smith v Sioux City Stock Yards Co. (Iowa)* 260 N.W. 531; *State v Switzler*, 143 Mo. 287, 45 S.W. 245; *Wiley v Solvay Process Co.*, 215 N.Y. 584, 109 N.E. 606; *Kearney v Vann*, 154 N.C. 311, 70 S.E. 747. "In the exposition of a statute then, the intention of a legislator may be discovered from different signs. As a primary rule it is to be collected from the words; when the words are not explicit, it is to be gathered from the occasion and the necessity of the law, the defects in the former law and the designed remedy; being the causes which moved the legislature to enact it. But in arriving at a conclusion from these last mentioned premises, the greatest care and circumspection, and the exercise of the soundest judicial discretion, are required; an attention, it will be seen, directed not only to the proper application of the rule, but to the reason upon which the rule is founded." *Dwarris (Potter) on Statutes*, p. 184.

⁵⁶ *Steber v State (Ala.)* 155 So. 706, cert. den. 155 So. 708.

the meaning clearly expressed by the language of the statute.⁵⁷ In this case, the statute is given a literal interpretation.⁵⁸ It is interpreted to mean exactly what it says.⁵⁹ Only where the statute is of doubtful meaning can the court endeavor to determine the legislative intention from elements beyond the language of the statute.⁶⁰ It may also make use of the various pertinent rules of construction in its efforts to ascertain the legislative intent in an ambiguous statute.⁶¹ The legislative intention is not found in these rules of construction but is revealed by them. They perform the function of a microscope. The same is true with reference to the subject matter of the statute,⁶² the purpose or object of its enactment,⁶³

⁵⁷ *U.S. Express Co. v Kentucky*, 238 U.S. 190, 59 L.Ed. 1267, 35 S.Ct. 824; *State v Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348; *Wall v Pfanschmidt*, 265 Ill. 180, 106 N.E. 785; *In re Bergson*, 220 Mass. 472, 107 N.E. 1007; *Erie R. Co. v Steinberg*, 94 Ohio St. 189, 113 N.E. 814; *State v State Board of Canvassers*, 159 Wis. 216, 150 N.W. 542. Also see Note, 50 L.R.A. (N.S.) 473. For a discussion of the construction of unambiguous statutes, see § 174, *infra*.

⁵⁸ *Bate Refrigerating Co. v Sulzberger*, 157 U.S. 1, 15 S.Ct. 508, 39 L.Ed. 601; *Eastman v State*, 109 Ind. 278, 10 N.E. 97; *Ayres v Trego County Comrs.*, 37 Kan. 240, 15 Pac. 229; *Clark v K. C. St. L. & C. R. Co.*, 219 Mo. 524, 118 S.W. 40; *People v Long Island R. Co.*, 194 N.Y. 130, 87 N.E. 79; *Burdick v Kimball*, 53 Wash. 198, 101 Pac. 845.

⁵⁹ *Johnson v Lowman (Ark.)* 97 S.W. (2) 86.

⁶⁰ *Van Winkle v State*, 4 Boyce (Dela.) 578, 91 Atl. 385; *Common. v International Harvester Co.*, 131 Ky. 551, 115 S.W. 703; *State v Partlow*, 91 N.C. 550. As these cases also indicate, conflict with other statutes and the like, will also justify the court in seeking assistance beyond the language of the statute in its efforts to locate the legislative intent. For treatment of extrinsic aids, see *infra*, Chapter XXI.

⁶¹ See *State of Mo. v Ross (C.C.A.—Mo.)* 80 Fed. (2) 329, cert. gr. 56 S.Ct. 669; *Barlow v Jones (Ariz.)* 294 Pac. 1106; *Abernathy v Board of Comrs.*, 169 N.C. 631, 86 S.E. 577.

⁶² *Sparkman v State*, 71 Fla. 210, 71 So. 34; *School Dist. v McFarland*, 154 Mo. Ap. 411, 134 S.W. 673; *State v Hyde*, 88 Ore. 1, 169 Pac. 757, 171 Pac. 582; *Ex parte Werner*, 46 R.I. 1, 124 Atl. 195.

⁶³ *Prussion v U.S.*, 282 U.S. 675, 51 S.Ct. 223, 75 L.Ed. 610; *In re Meyers*, 19 Fed. (2) 600; *Richardson Lumber Co. v Howell*, 219 Ala. 328, 122 So. 343; *Coggins v Ely*, 23 Ariz. 155, 202 Pac. 391; *Gill v Sanders*, 182 Ark. 453, 31 S.W. (2) 748; *Bannerman v Boyle*, 160 Calif. 197, 116 Pac. 732; *Glos v Glos*, 341 Ill. 447, 173 N.E. 604, 72 A.L.R. 1328; *State v Claiborne*, 185 Iowa 170, 170 N.W. 417, 3 A.L.R. 392; *National F. Ins. Co. v Goggin*, 267 Mass. 430; *Boll v Condie-Bray Glass Co.*, 321 Mo. 92, 11 S.W. (2) 48; *Archer v Equit. Life Assur. Soc.*, 218 N.Y. 18, 112 N.E. 433; *Williams v Rheas, Inc.*, 99 Pa. Super. 438; *State v Gregory (Wis.)* 232 N.W. 546.

its effect and consequences,⁶⁴ its occasion and necessity,⁶⁵ and its logic⁶⁶—all of which are not sources of the legislative intent but aids to its discovery. In other words, the court resorts to these aids not for the legislative intent but simply to identify it. The language is the reservoir of the legislative intention. It must in some feeble manner, at least, reveal some intention; otherwise, as we will hereafter see,⁶⁷ the statute will completely fall. For if the statute is without meaning, the court cannot supply one,⁶⁸ as that would involve an encroachment upon the legislative power.

In this connection, it should also be noted that the statute should be construed according to the legislative intent existing therein at the time of its enactment.⁶⁹ The words which make up the statute should be given the meaning that they had at the time of its passage,⁷⁰ even though the language used may be broad enough to include subjects unknown at the time of the law's enactment.⁷¹ Or stated in a different manner, the language as it was understood when used by the law-makers constitutes the source from which the legislative intention must be ascertained.

§ 165. Statutes as a Whole.—Inasmuch as the language of a statute constitutes the depository or reservoir of the legislative intent, in order to ascertain or discover that intent, the statute

⁶⁴ *Newgirk v Black*, 174 Iowa 636, 156 N.W. 708; *Nye v Board of Comrs.* (N.M.) 9 Pac. (2) 1023; *Hathorn v Natural Carbonic Gas. Co.*, 194 N.Y. 326, 87 N.E. 504.

⁶⁵ *People v Faherty*, 306 Ill. 119, 136 N.E. 506; *Oliphant v Hawkinson*, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; *Bennett v Michigan Pulp Wood Co.*, 181 Mich. 33, 147 N.W. 490; *State v Diveling*, 66 Mo. 375; *People v Essex County*, 70 N.Y. 228; *State v Polley*, 30 S.D. 528, 139 N.W. 118. Its expediency may also be inquired into. *State v Regan*, 317 Mo. 1216, 298 S.W. 747, 55 A.L.R. 773.

⁶⁶ *Petroleum Casualty Co. v Williams* (Tex. Comm. Ap.) 15 S.W. (2) 553.

⁶⁷ See § 198, *infra*.

⁶⁸ *Ibid*.

⁶⁹ *U.S. v Union Pac. R. Co.*, 91 U.S. 72, 23 L.Ed. 224; *Common. v Erie*, etc., R. Co., 27 Pa. St. 339; *Werner v Hillman Coal Co.*, 300 Pa. 256, 150 Atl. 471, 70 A.L.R. 967. And see *People v Barnett*, 319 Ill. 403, 150 N.E. 290; *State v Boston*, etc., R. Co., 123 Me. 48, 121 Atl. 541.

⁷⁰ *In re Bergeron*, 220 Mass. 472, 107 N.E. 1007.

⁷¹ *Remick v American Auto Accessories Co.*, 5 Fed. (2) 411, 40 A.L.R. 1151; *State v Boston*, etc., R. Co., 123 Me. 48, 121 Atl. 541; *Whitney v Welnitz*, 153 Minn. 162, 190 N.W. 57, 28 A.L.R. 68. But note *Funk v St. Paul City R. Co.*, 61 Minn. 435, 63 N.W. 1099, 29 L.R.A. 208.

must be considered as a whole,⁷² just as it is necessary to consider a sentence in its entirety in order to grasp its true meaning. Consequently, effect and meaning must be given to every part of the statute which is being subjected to the process of construction—to every section, sentence, clause, phrase and word.⁷³ This is a

⁷² Ex parte Thomson, 278 U.S. 555, 73 L.Ed. 520, 49 S.Ct. 249; Baxter v McGee (C.C.A.—Ark.) 82 Fed. (2) 695; Mooring v State, 207 Ala. 34, 91 So. 869; Street v Commercial Credit Co., 35 Ariz. 479, 281 Pac. 46, 67 A.L.R. 1549; Berry v Cousart Bayor Drainage Dist., 181 Ark. 974, 28 S.W. (2) 1060; Crowe v Boyle, 184 Calif. 117, 193 Pac. 111; Miller v Limon Nat. Bank, 88 Colo. 373, 296 Pac. 796; Harlee v Federal Finance Corp. (Defa.) 152 Atl. 596; Amos v Conkling, 99 Fla. 206, 126 So. 283; Ingard v Barker, 27 Idaho 124, 147 Pac. 293; People v Goldberg, 332 Ill. 346, 163 N.E. 781; State v Lewis, 187 Ind. 564, 120 N.E. 129; Anderson v Jester, 206 Iowa 452, 221 N.W. 354; Barrett v Duff, 114 Kan. 220, 217 Pac. 918; Earhart v Middendorf, 234 Ky. 78, 27 S.W. (2) 657; State v Sage, 162 La. 635, 110 So. 884; In re Opinion of Justices (Mass.) 175 N.E. 644; Taylor v Hart, 210 Mich. 418, 189 N.W. 221; State v Dist. Court, 134 Minn. 131, 158 N.W. 798; McKenzie v Boukin, 111 Miss. 256, 71 So. 382; State ex rel Dean v Daus, 321 Mo. 1126, 14 S.W. (2) 990; State v Mountjoy, 82 Mont. 594, 268 Pac. 558; Ford v State, 79 Neb. 309, 112 N.W. 606; Ex parte Smith, 36 Nev. 568, 137 Pac. 515; Bogert v Hackensack Water Co., 101 N.J.L. 518, 129 Atl. 138; In re Terry's Estate, 218 N.Y. 218, 112 N.E. 931; State v Burnett, 173 N.C. 750, 91 S.E. 597; Grabow v Bergeth, 59 N.D. 214, 229 N.W. 282; Caldwell v State, 115 Ohio St. 458, 154 N.E. 792; State v Wenner, 121 Okla. 190, 249 Pac. 408; Stowe v Ryan (Ore.) 296 Pac. 857; Common. v City of Wilkes-Barre, 258 Pa. 130, 101 Atl. 929; Columbia Gaslight Co. v Mobley, 139 S.C. 107, 137 S.E. 211; State v Halladay, 52 S.D. 497, 219 N.W. 125; Finley v Keisling Lumber Co., 162 Tenn. 184, 35 S.W. (2) 388; Texas Bank & Trust Co. v Austin, 115 Tex. 201, 280 S.W. 161; Smith v Lenzi (Utah) 297 Pac. 893; Grout v Gates, 97 Vt. 434, 124 Atl. 76; King v Empire Collieries Co., 152 Va. 649, 148 S.E. 794; Detamore v Hindley, 83 Wash. 322, 145 Pac. 462; State v Hall, 86 W.Va. 1, 103 S.E. 694; State v Anderson, 191 Wis. 538, 211 N.W. 938. Optima statuti interpretatio est (omnibus particulis ejusdem inspectis) ipsum statutum; injustum est nisi tota lege inspecta, una aliqua ejus particula proposita judicare vel respondere. Sedgwick, Constr. Stat. (2nd Ed.) p. 199.

⁷³ D. Ginsberg & Sons v Popkin, 285 U.S. 204, 76 L.Ed. 704, 52 S.Ct. 322; Ambler v Whipple, 139 Ill. 311, 28 N.E. 841; Johnson v Schloesser, 146 Ind. 509, 45 N.E. 702; Young v Regents of Univ., 87 Kan. 239, 124 Pac. 150; State v Jordan, 266 Mo. 394, 181 S.W. 1016; Libby v New York, etc., R. Co., 273 Mass. 522, 174 N.E. 171, 73 A.L.R. 101; State ex rel Nagle v Sullivan (Mont.) 140 Pac. (2) 995; Reiter v Chapman, 177 Wash. 392, 31 Pac. (2) 1005, 92 A.L.R. 828. Even unconstitutional parts must be considered. Swift v Callan, 102 Iowa 206, 71 N.W. 233, 37 L.R.A. 462; Ruhlman v Waterman, 29 R.I. 265, 71 Atl. 450. And see Crooks v People's Finance Co. (Calif.) 292 Pac. 1065; Philadelphia v Barber, 160 Pa. 123, 28 Atl. 644. And the same is equally true with reference to parts which have been repealed. Bank for Savings v The Collector, 3 Wall. (U.S.) 495, 18 L.Ed. 207; State v Dist. Court, 51 Mont. 305, 152 Pac. 745; Ogden City v Boreman, 20 Utah 98, 57 Pac. 843.

principle based upon human experience with man's modes of expression and the inevitable limitations of our language. So far as statutes are concerned, ordinarily, many words and phrases and often sentences must be used to express the legislative idea or intent. Abstractly, a word or phrase might easily convey a meaning quite different from the one actually intended and evident when the word or phrase is considered with those with which it is associated. The same is equally true with sentences and paragraphs. Abstractly, the thought expressed in a detached sentence or paragraph may have little or no resemblance to the idea actually intended. Each word, phrase, clause and sentence are the elements from which the legislative intent is formed. The various words, phrases, clauses, and sentences make up the frame-work which supports the legislative intent. They are mutually dependent. Co-operatively, they convey the ultimate idea.

Morover, a statute should be construed as a whole because it is not to be presumed that the legislature has used any useless words,⁷⁴ and because it is a dangerous practice to base the construction upon only a part of it, since one portion may be qualified by other portions.⁷⁵ In addition to being subject to qualification, words are not always used accurately by the legislature.⁷⁶ The thought conveyed by the statute in its entirety may reveal the inaccurate use.

Hence, the court should, when it seeks the legislative intent, construe all of the constituents parts of the statute together,⁷⁷ and

⁷⁴ *Ranier Nat. Park Co. v Martin*, 18 Fed. Supp. 481, 23 Fed. Supp. 60, aff. 58 S.Ct. 478; *Wayman v Southard*, 10 Wheat. (U.S.) 1, 6 L.Ed. 253; *Stephen v Cherokee Nation*, 174 U.S. 445, 19 S.Ct. 722, 43 L.Ed. 1041. "It is a well recognized principle of construction that all of the language used in the statute will be deemed to have been intentionally used to effect the meaning of the act." *Bienz v State*, 206 Ind. 482, 190 N.E. 170.

⁷⁵ *City of San Diego v Granniss*, 77 Calif. 511, 19 Pac. 875.

⁷⁶ *Belleville, etc., R. Co. v Gregory*, 15 Ill. 20; *State v Gardner*, 174 Iowa 748, 156 N.W. 747; *Wayman Bros. Co. v Ochoco Irr. Dis.*, 108 Ore. 1, 210 Pac. 873; *Kitchen v Southern R. Co.*, 68 S.C. 554, 48 S.E. 4; *St. Johnsbury v Thompson*, 59 Vt. 300, 9 Atl. 571.

⁷⁷ *U.S. v Moore*, 95 U.S. 762, 24 L.Ed. 588; *Williams v State*, 99 Ark. 149, 137 S.W. 927; *Denver v Hobbs*, 58 Colo. 220, 144 Pac. 874; *People v Price*, 257 Ill. 587, 101 N.E. 196; *Palmer v Cedar Rapids*, 165 Iowa 595, 146 N.W. 827; *Young v Regents of Univ.*, 87 Kan. 239, 124 Pac. 150; *Cassard v Tracy*, 52 La. Ann. 835, 27 So. 368; *Stout v Keyes*, 2 Doug. (Mich.) 184; *Humes v Mo. Pac. R. Co.*, 82 Mo. 221, 52 Am.Rep. 369; *Fargo Bottling Wks. v State*, 19 N.D. 396, 124 N.W. 387.

seek to ascertain the legislative intention from the whole act,⁷⁸ considering every provision thereof in the light of the general purpose and object of the act itself,⁷⁹ and endeavoring to make every part effective, harmonious, and sensible.⁸⁰ This means, of course, that the court should attempt to avoid absurd consequences in any part of the statute⁸¹ and refuse to regard any word, phrase, clause or sentence superfluous, unless such a result is clearly unavoidable.⁸² The court must construe the statute in this manner, for by failing to do so, the statute is not considered in its entirety and the intention of the legislature is likely to be defeated. The legislative intent is just as apt to be lost where a word, phrase or sentence of the statute is rejected as where they are considered separate and apart from the rest of the statute. This is in accord with our use of words. The omission of a word from a sentence may easily cause it to express an idea quite different from the one actually intended and expressed.

⁷⁸ "In construing the law, we do not take detached sentences or sections, but take the statute by its four corners, the better to ascertain the intent of the lawmakers." *State v Lee Chue*, 130 Ore. 99, 179 Pac. 285, 288. "The act must be interpreted as a whole and not by taking single words here and there . . ." *In re Milwaukee Izaak Walton League*, 194 Wis. 437, 216 N.W. 493, 494.

⁷⁹ *State Public Util. Comm. v Monarch Refrig. Co.*, 267 Ill. 528, 108 N.E. 716; *Lime City Bldg. Loan & Sav. Assoc. v Black*, 136 Ind. 544, 35 N.E. 829; *State v Roby*, 142 Ind. 168, 41 N.E. 145; *People v Long Island R. Co.*, 194 N.Y. 130, 87 N.E. 79; *State ex rel Minneapolis St.P. & S.S.M.R. Co. v Railroad Comm.*, 137 Wis. 80, 117 N.W. 846.

⁸⁰ *Calhoun Gold Min. Co. v Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607; *Cory v Carter*, 48 Ind. 337; *Rohlf v Kasemeier*, 140 Iowa 182, 118 N.W. 276; *Young v Regent of Univ.*, 124 Pac. 150, 87 Kan. 239; *Hyoonen v Hector Iron Co.*, 103 Minn. 331, 115 N.W. 167; *Kennington v Heminway*, 101 Miss. 259, 57 So. 809; *Clough v Boston, etc., R. Co.*, 77 N.H. 222, 90 Atl. 863; *Hines v Wilmington, etc., R. Co.*, 95 N.C. 434; *Bohart v Anderson*, 24 Okla. 82, 103 Pac. 742; *Lynchburg v Norfolk, etc., R. Co.*, 80 Va. 237.

⁸¹ *People v Sholem*, 238 Ill. 203, 87 N.E. 390; *Bingham v Birmingham*, 103 Mo. 345, 15 S.W. 533; *J. I. Case Threshing Mach. Co. v Watson*, 122 Tenn. 156, 122 S.W. 974.

⁸² *American Bosch Magneto Corp. v U.S.*, 6 Fed. Sup. 455.

§ 166. **Conflicting Provisions.**—As above suggested,⁸³ the court should seek to avoid any conflict in the provisions of the statute by endeavoring to harmonize and reconcile every part so that each shall be effective.⁸⁴ It is not easy to draft a statute, or any other writing for that matter, which may not in some manner contain conflicting provisions. But what appears to the reader to be a conflict may not have seemed so to the drafter. Undoubtedly, each provision was inserted for a definite reason. Often by considering the enactment in its entirety, what appears to be on its face a conflict may be cleared up and the provisions reconciled.

Consequently, that construction which will leave every word operative will be favored over one which leaves some word or pro-

⁸³ See note 113, *supra*.

⁸⁴ *Jones v York County*, 47 Fed. (2) 837; *Hendon v McCoy*, 222 Ala. 515, 133 So. 295; *Hunt v Callaghan*, 32 Ariz. 235, 257 Pac. 648; *Ex parte Haines*, 195 Calif. 605, 234 Pac. 883; *Elks v Conn.*, 186 Iowa 48, 172 N.W. 173; *Thacher v Cook*, 250 Mass. 188, 145 N.E. 256; *Rohde v Murfin*, 168 Mich. 683, 131 N.W. 523, 135 N.W. 457; *State ex rel St. Louis Pub. Serv. Co. v Public Ser. Comm. (Mo.)* 34 S.W. (2) 486; *Price v Erie County*, 221 N.Y. 260, 116 N.E. 988; *State v Burnett*, 173 N.C. 750, 91 S.E. 597; *Manuel v Manuel*, 13 Ohio St. 103; *Raeder v Stewart Silk Co.*, 28 Pa. Dist. 763; *Zurich Gen. Acc. & Ins. Co. v Walker (Tex. Com. Ap.)* 35 S.W. (2) 115; *Willis v Kalmbach*, 109 Va. 475, 64 S.E. 342. "The trouble with the interpretations suggested by appellants . . . is that they violate a cardinal principle of statutory construction; namely, that all parts of the statute must, if possible, be given meaning and effect. In order to carry his point, one may not cull out parts of the statute inconsistent with his view and treat them as surplusage or idle repetition . . . The real question is whether this clause, as well as other parts of the statute, can be given force and effect, and at the same time carry out the evident legislative intent of the act taken as a whole." *Castilo v State Highway Comm.*, 312 Mo. 244, 279 S.W. 673, 4. "It is a well established rule . . . that in deciding intent and meaning all parts of an act must be read together, a single sentence should not be torn from its place and thus stripped of its relation to the whole, and independently interpreted; any construction which results in one part of a statute nullifying another shall be avoided." *Rueffer v Dept. of Agric.*, 2 N.Y.S. (2) 545, 166 Misc. 430.

vision meaningless because of inconsistency.⁸⁵ But a word should not be given effect, if to do so gives the statute a meaning contrary to the intent of the legislature.⁸⁶ On the other hand, if full effect cannot be given to the words of a statute, they must be made effective as far as possible.⁸⁷ Nor should the provisions of a statute which are inconsistent be harmonized at a sacrifice of the legislative intention.⁸⁸ It may be that two provisions are irreconcilable;⁸⁹ if so, the one which expresses the intent of the law-makers should control.⁹⁰ And the arbitrary rule has been frequently announced that where there is an irreconcilable conflict between the different provisions of a statute, the provision last in order of position will

⁸⁵ Also see cases under note 113, *supra*; *U.S. v Ninety-Nine Diamonds*, 139 *Fed.* 961, 72 C.C.A. 9; *City of Denver v Campbell*, 33 *Colo.* 162, 80 *Pac.* 142; *Jones v Grieser*, 238 *Ill.* 183, 87 *N.E.* 295; *Sutton v Parker*, 65 *Ind.* 536; *Coggschall v City of Des Moines*, 138 *Iowa* 730, 117 *N.W.* 309; *Noecker v Noecker*, 66 *Kan.* 347, 71 *Pac.* 815; *Johnson v Equit. Life Assur. Soc.*, 137 *Ky.* 437, 125 *S.W.* 1074; *Ryan v City of Boston*, 204 *Mass.* 456, 90 *N.E.* 581; *Robinson v Harmon*, 157 *Mich.* 266, 117 *N.W.* 661; *State ex rel School Dist. of Sedalia v Harter*, 188 *Mo.* 516, 87 *S.W.* 941; *Baxter v N. Y., etc., R. Co.*, 124 *Ap. Div.* 79, 112 *N.Y.S.* 455; *State v Rutland R. Co.*, 81 *Vt.* 508, 71 *Atl.* 197; *Hoover v Sanders*, 104 *Va.* 783, 52 *S.E.* 657; *Baxter v Wade*, 39 *W.Va.* 281, 19 *S.E.* 404; *State v Columbian Nat. Life Ins. Co.*, 141 *Wis.* 557, 124 *N.W.* 502. There is a presumption that the legislature did not intend to use useless words or to leave part of the statute meaningless or to create irreconcilable conflict in its provisions. *Hannon v Southern Pac. R. Co.*, 12 *Calif. Ap.* 350, 107 *Pac.* 335; *Postal Tel. Cable Co. v Norfolk & W. R. Co.*, 88 *Va.* 920, 14 *S.E.* 803.

⁸⁶ *Van Dyke v Cordova Copper Co.*, 234 *U.S.* 188, 34 *S.Ct.* 884, 58 *L.Ed.* 1273; *Tulsa v Weston*, 102 *Okla.* 222, 229 *Pac.* 108; *Crescent Mfg. Co. v S.C. Tax. Comm.*, 129 *S.C.* 480, 124 *S.E.* 761; *Harris v Comm.*, 142 *Va.* 620, 128 *S.E.* 578.

⁸⁷ *Old Dominion B. & L. Assn. v Sohn*, 54 *W.Va.* 101, 46 *S.E.* 222.

⁸⁸ See *Lindley v Cross*, 31 *Ind.* 106. Also note *New York Life Ins. Co. v Bowers*, 34 *Fed.* (2) 60, *aff.* 39 *Fed.* (2) 556, *cert. gr.* 281 *U.S.* 718, 50 *S.Ct.* 464, 74 *L.Ed.* 1138. Where one of two conflicting clauses bears two meanings and the other only one, the latter will control. See *Dennis v Moses*, 18 *Wash.* 537, 52 *Pac.* 333, 40 *L.R.A.* 302.

⁸⁹ *City of Los Angeles v Glassell*, 82 *Calif. Ap.* 96, 255 *Pac.* 209. Also see *Reuter v Board of Supervisors (Calif.)* 30 *Pac.* (2) 417.

⁹⁰ And words control over figures. *Weaver v Davidson County*, 104 *Tenn.* 315, 59 *S.W.* 1105.

prevail, since it is the latest expression of the legislative will.⁹¹ Obviously, the rule is subject to deserved criticism.⁹² It is seldom applied,⁹³ and probably then only where an irreconcilable conflict exists between different sections of the same act,⁹⁴ and after all other means of ascertaining the meaning of the legislature have been exhausted.⁹⁵ Where the conflict is between two statutes, more may be said in favor of the rule's application, largely because of the principle of implied repeal.⁹⁶

⁹¹ *U.S. v Updike*, 25 Fed. (2) 746; *Davis v State*, 16 Ala. Ap. 397, 78 So. 313; *Spreckles v Graham*, 194 Calif. 516, 228 Pac. 1040; *Burton v City of Denver (Colo.)* 61 Pac. (2) 856; *Peterson v People*, 129 Ill. Ap. 55; *Cox v Timm*, 182 Ind. 7, 105 N.E. 479; *Coker v Wilkinson*, 142 Miss. 1, 106 So. 886; *St. ex rel Greene County v Gideon*, 273 Mo. 79, 199 S.W. 948; *St. v Tullock*, 72 Mont. 482, 234 Pac. 277; *Ex parte Smith*, 33 Nev. 466, 111 Pac. 939; *People ex rel Barnes v Warden*, 215 N.Y.S. 110, 127 Misc. 224; *Stevens v State*, 70 Tex. Cr. 565, 159 S.W. 505; *State v Stratton*, 108 Wash. 485, 185 Pac. 610. If two sections of a statute are enacted at the same time, both should be harmonized. *School Dist. of Omaha v Gass (Neb.)* 267 N.W. 528. It is only where conflicting statutes or provisions are enacted at different times, that the rule in the above text, as a general rule, should be applicable. See *In re Jacobs*, 7 Fed. Sup. 749, for such a case.

⁹² The legislative intent must be derived from the statute as a whole, *Marengo County v Wilcox County*, 215 Ala. 640, 112 So. 243. It is arbitrary. *Smith v Board of Trustees*, 198 Calif. 301, 245 Pac. 173. There is no priority of time because of position. *State v Bates*, 96 Minn. 110, 104 N.W. 709; also see *Hillsbrough County v Jackson*, 58 Fla. 210, 50 So. 423; *Ex parte Tillman*, 84 S.C. 552, 66 S.E. 1049.

⁹³ *Iglehart v Iglehart*, 204 U.S. 478, 51 L.Ed. 575. So many exceptions have been created, that there is little left to the rule. Thus, if the first provision is clear and the latter incoherent, the first prevails, *People v Dobbins*, 73 Calif. 257, 14 Pac. 860; *State ex rel Wilson v Williams*, 8 Ind. 191, or the first represents the legislative intent and the latter provision does not, the former prevails. *Hall v State*, 39 Fla. 637, 23 So. 119; *State ex rel Patterson v Bates*, 96 Minn. 110, 104 N.W. 709. And, as indicated in the text, the intention as revealed by the entire act, controls any provision regardless of its position. *Penick v High Shoals Mfg. Co.*, 113 Ga. 592, 38 S.E. 973; *Shutt v State*, 173 Ind. 689, 89 N.E. 6; *Gist v Rackliffe-Gibson Const. Co.*, 224 Mo. 369, 123 S.W. 921.

⁹⁴ *In re Steehler's Estate*, 195 Calif. 386, 233 Pac. 972.

⁹⁵ *People v McClare*, 99 N.Y. 83, 1 N.E. 235.

⁹⁶ For cases where this rule has been applied, see *Branagan v Dulaney*, 8 Colo. 408, 8 Pac. 669; *Commrs. of Highways v Deboe*, 43 Ill. Ap. 25; *State v Miskimmons*, 2 Ind. 440; *Pease v Whitney*, 5 Mass. 380; *City of Cincinnati v Holmes*, 56 Ohio St. 104, 46 N.E. 514; *Branham v Long*, 78 Va. 352; *Jones v Broadway Roller Rink Co.*, 136 Wis. 595, 118 N.W. 170. For detailed treatment of implied repeals, see *supra*, § 137.

§ 167. **General and Special Provisions.**—Provisions of this type in the same statute should also be harmonized, if possible,⁹⁷ but in the event they are in irreconcilable conflict, the specific provision will control,⁹⁸ unless the statute, considered in its entirety, indicates a contrary intention upon the part of the legislature.⁹⁹ *Generalia specialibus non derogant*. This same rule applies to two conflicting statutes,¹⁰⁰ unless the general statute impliedly repeals the special one.¹⁰¹

While general and special provisions are both sources of the legislative intent, and both are entitled to consideration in the

⁹⁷ See *Aron v U.S.*, 204 Fed. 943, 123 C.C.A. 265; *State v Commrs. of Railroad Taxation*, 37 N.J.L. 228; *State ex rel Jones v Burke*, 140 Wis. 524.

⁹⁸ *U.S. v Jackson*, 143 Fed. 783, 75 C.C.A. 41; *The Beechwood*, 35 Fed. (2) 41; *Ivey v Railway Fuel Co.*, 218 Ala. 407, 118 So. 583; *State v Lumberman's Indemnity Exch.*, 24 Ariz. 306, 209 Pac. 294; *Martin v Board of Educ. Commrs.*, 126 Calif. 404, 58 Pac. 932; *Guyer v Stutt*, 68 Colo. 422, 191 Pac. 120; *Kelly v Dewey*, 111 Conn. 281, 149 Atl. 840; *McKean v Gauthier*, 132 Ill. Ap. 376; *Straus Bros. Co. v Fisher*, 200 Ind. 307, 163 N.E. 225; *Story County v Hansen*, 178 Iowa 452, 159 N.W. 1000; *Long v Culp*, 14 Kan. 412; *State v Fontenot*, 112 La. 628, 36 So. 630; *Public Schools v Kennedy*, 245 Mich. 585, 223 N.W. 359; *State ex rel Brotherhood of Am. Yeoman v Reynolds*, 287 Mo. 169, 229 S.W. 1057; *Newton v Weiler*, 87 Mont. 164, 286 Pac. 133; *State ex rel Prout v Nolan*, 71 Neb. 136, 98 N.W. 657; *State v Boerlin*, 38 Nev. 39, 144 Pac. 738; *Bartlett v Trenton*, 38 N.J.L. 64; *People v Gilon*, 126 N.Y. 147, 27 N.E. 282; *State v Connar*, 123 Ohio St. 310, 175 N.E. 200; *Common. v Macelwee*, 294 Pa. 569, 144 Atl. 751; *State v Bowden*, 92 S.C. 393, 75 S.E. 866; *Luze v Bruening*, 42 S.D. 414, 176 N.W. 41; *Wade v Madding*, 23 S.W. (2) 642; *San Antonio v Toepperwein*, 104 Tex. 43, 133 S.W. 416; *Kelley v Bowman*, 68 W.Va. 49, 69 S.E. 456; *State v Industrial Comm.*, 172 Wis. 415, 179 N.W. 579.

⁹⁹ *Bailey v Allen E. Walker, Inc.*, 2 Fed. (2) 614; *State v Williams (Mont.)* 79 Pac. (2) 314.

¹⁰⁰ *Waldo v Bell*, 13 La. Ann. 329; *State ex rel Kellogg v Bishop*, 41 Mo. 16; *Fosdick v Perryburg*, 14 Ohio St. 472; *Brown v County Comrs.*, 21 Pa. 37; *Malloy v Common.*, 115 Pa. 25, 7 Atl. 790. Also see *State v Mills*, 34 N.J.L. 177.

¹⁰¹ *Board of Water Comrs. v Conkling*, 113 Ill. 340; *State v Omaha Elevator Co.*, 75 Neb. 637, 106 N.W. 979. Also note *State v Williamson*, 44 N.J.L. 165.

construction of statutes by virtue of the rule requiring construction as a whole, the reason for granting the latter the power to control the former is obvious. It is founded upon a characteristic connected with our use of our language.¹⁰² It is in accord with our use of the English language.

§ 168. Implications.—The implications and intendments arising from the language of a statute are as much a part of it as if they had been expressed.¹⁰³ But it is only necessary implications which may thus be read into the statute.¹⁰⁴ Mere desirability or plausibility alone will not meet the test. And while the implication does not need to shut out every other possible conclusion, or be one from which there is no escape, it must be one, which, under all the circumstances, is compelled by a reasonable view of the statute, and the contrary of which would be improbable and absurd.¹⁰⁵ In

¹⁰² See §§ 139 and 230, *infra*, for further treatment.

¹⁰³ *U.S. v Sischo*, 262 U.S. 165, 43 S.Ct. 511, 67 L.Ed. 925; *Coggins v Ely*, 23 Ariz. 155, 202 Pac. 391; *Cassady v Sholtz*, 124 Fla. 718, 169 So. 487; *Hanchett v Weber*, 17 Ill. Ap. 114; *Gilbert v Craddock*, 67 Kan. 346, 72 Pac. 869; *Peets v Martin*, 135 Miss. 720, 101 So. 78; *Coonce v Munday*, 3 Mo. 373; *State ex rel Coleman v Blair*, 245 Mo. 680, 151 S.W. 148; *In re Hapman's Estate*, 102 Neb. 550, 167 N.W. 792; *Archer v Equitable Life Assur. Soc.*, 218 N.Y. 18, 112 N.E. 433; *Pioneer Real Estate Co. v City of Portland*, 119 Ore. 1, 247 Pac. 319; *Wisconsin Granite Co. v State*, 54 S.D. 482, 223 N.W. 600; *McCamey v Hollister (Tex. C.Ap.)* 241 S.W. 689; *State v Harden*, 62 W.Va. 313, 58 S.E. 715, 60 S.E. 394; *Ex parte Watson*, 82 W.Va. 201, 95 S.E. 648; *State v Frear*, 144 Wis. 58, 128 N.W. 1061.

¹⁰⁴ *Garvan v Marconi Wireless Tel. Co.*, 275 Fed. 486; *Getzen v Sumter County*, 89 Fla. 45, 103 So. 104; *Head v N. Y. Life Ins. Co.*, 241 Mo. 420, 147 S.W. 832, rev. 234 U.S. 166, 34 S.Ct. 883, 58 L.Ed. 1266; *Matter of Meyer*, 209 N.Y. 386, 103 N.E. 713; *Creeger v Hidalgo County Water Dist. (Tex.)* 283 S.W. 151; *Saund v Saund*, 100 Vt. 176, 136 Atl. 22, 138 Atl. 867; *Matheny v White*, 88 W.Va. 270, 106 S.E. 651. Also see *People ex rel Benham v Williams*, 8 Calif. 97; *Glylde v Keister*, 32 Pa. 85. And note *Pittsburg & C. R. Co. v S. West Pa. R. Co.*, 77 Pa. 173, that every legislative grant is made with the implied reservation that it shall not injure the property or rights of other persons.

¹⁰⁵ *Gilbert v Craddock*, 67 Kan. 346, 72 Pac. 869.

order to meet the test, the implication must be so strong in its probability that the contrary thereof cannot be reasonably supposed.¹⁰⁶ Nor can implications contradict the expressed intent of the statute,¹⁰⁷ for obviously the intent as expressed must prevail over the intent reached by implication. If the intent is expressed, there is nothing that can be implied. Nothing further is needed to reveal the legislative intent.

The reason for allowing the court to give effect to necessary implications is quite apparent. Many matters of minor detail are often omitted from legislation. If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission. Consequently, these minor details are considered as if included in the general terms of the enactment as well as in the purpose sought to be achieved by the legislature, and therefore, are regarded as actually intended by the legislature. In a broad sense, true implications are as much a part of the language which makes up the statute as the meanings of the various words are a part of it. Viewed from this standpoint, no exception is created to the general rule that the intent of the law-makers must be derived from the language used in the enactment. And the court in ascertaining a necessary implication is simply determining and making effective the legislative will.

One may find numerous situations where statutes have been extended by implication. Thus, a statutory grant of a power, privilege or property carries with it, by implication everything

¹⁰⁶ *First National Bank v DeBeriz*, 87 W.Va. 477, 105 S.E. 900. And see *In re Cook's Estate*, 118 N.J. Eq. 288, 179 Atl. 259, 99 A.L.R. 551, where the court refused to interpret the statute so as to require the attesting witnesses of a will to sign in the presence of each other "because the statute does not by its terms require that the witnesses shall subscribe their names in the presence of each other, and the courts will not lightly incorporate in legislative enactments a meaning not expressed therein; it would be justified in so doing only by the compulsion of a necessary implication."

¹⁰⁷ *Braffith v People*, 26 Fed. (2) 646; *Greenlee County v Laine*, 20 Ariz. 296, 180 Pac. 151; *Equitable Life Assur. Soc. v Hart*, 55 Mont. 76, 173 Pac. 1062; *State v Hardin*, 62 W.Va. 313, 58 S.E. 715, 60 S.E. 394. And in *Grasso v Cannon Ball Freight Lines*, 125 Tex. 154, 81 S.W. (2) 482, the court held that a provision which both houses had expressly rejected, could not be read into the act by implication.

necessary to its enjoyment or exercise.¹⁰⁸ So also the creation of a new duty or obligation or the prohibition of an act formerly lawful, carries with it, by implication, a corresponding remedy to assure its observance,¹⁰⁹ and an act performed in contravention to a prohibitory statute, is by implication, void.¹¹⁰ And where a statute deals with a genus, a species thereof may be extended, by this rule, to include the new species.¹¹¹ But where the legislative purpose in enacting a statute is to effect a radical departure from a firmly established policy, such purpose will not be implied but must be clearly expressed.¹¹²

¹⁰⁸ *Dooley v Pennsylvania R. Co.*, 250 Fed. 142; *McNeill v Pace*, 69 Fla. 349, 68 So. 177; *Hyland v Rochelle*, 179 Ind. 671, 100 N.E. 842; *Willis v Consolidated Ind. School (Iowa)* 227 N.W. 532; *Boos v McClendon*, 130 La. 813, 58 So. 582; *Providence R. Co. v Norwich R. Co.*, 138 Mass. 277; *State ex rel Wahl v Speer*, 284 Mo. 45, 278 S.W. 769; *State v Hall*, 50 Mont. 314, 146 Pac. 927; *Panchot v Leet*, 26 N.M. 422; *New York v Sands*, 105 N.Y. 210, 11 N.E. 820; *State v Nestos*, 48 N.D. 894, 187 N.W. 233; *Wells v Wells-Crawford*, 120 Ore. 557, 251 Pac. 263; *State v Cain*, 78 S.C. 348, 58 S.E. 937; *Terrell v Sparks*, 104 Tex. 191, 135 S.W. 519; *Saund v Saund*, 100 Vt. 176, 136 Atl. 22, 138 Atl. 867; *Hogan v Piggott*, 60 W.Va. 541, 56 S.E. 189. But it should be noted, a power specifically conferred cannot be extended by implication. *Eikhoff v Charter Comm.*, 176 Mich. 535, 142 N.W. 746. See also *Spears v City of San Antonio*, 110 Tex. 618, 223 S.W. 166. Conversely, one granted in general terms may be thus extended. For instance, where the erection of a school building was authorized, although such a building may be erected without equipment, the latter is vitally necessary to its use, and without the same, its erection would be futile and the purpose of its erection a useless formality, the power to purchase equipment must necessarily be implied. *Hudgins et al v Mooresville School Dist.*, 312 Mo. 1, 278 S.W. 769.

¹⁰⁹ *Johnston v City of Louisville*, 11 Bush. (Ky.) 527; *People v Stevens*, 13 Wend. (N.Y.) 341.

¹¹⁰ *Clark v Protection Ins. Co.*, 1 Story 109, Fed. Cas. No. 2832; *Bacon v Lee*, 4 Iowa 490; *Cobb v Billings*, 23 Me. 470; *Loranger v Jardine*, 56 Mich. 518, 23 N.W. 203; *Bancroft v Dumas*, 21 Vt. 456. "It is a familiar rule of statutory construction that, where a statute limits a thing to be done in a particular method or manner, it indicates within its provisions a negative, and the negative is that it shall not be done otherwise." *Weil Bros. v Southern Ry. Co.*, 21 Ala. Ap. 245, 107 So. 38, 39.

¹¹¹ *McCleary v Babcock*, 169 Ind. 228, 82 N.E. 453; *Hurley v Inhabitants of S. Thomaston*, 105 Me. 301, 74 Atl. 734.

¹¹² *Bayonne Textile Corp. v Am. Federation of Silk Workers*, 116 N.J. Eq. 146, 172 Atl. 551, 92 A.L.R. 1450.

§ 169. **Casus Omissus.**—Omissions in a statute cannot, as a general rule, be supplied by construction.¹¹³ Thus, if a particular case is omitted from the terms of a statute, even though such a case is within the obvious purpose of the statute and the omission appears to have been due to accident or inadvertence, the court cannot include the omitted case by supplying the omission.¹¹⁴ This is equally true where the omission was due to the failure of the legislature to foresee the missing case.¹¹⁵ As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature.¹¹⁶

But, inasmuch as it is the intention of the legislature which constitutes the law of any statute,¹¹⁷ and since the primary purpose of construction is to ascertain that intention,¹¹⁸ such intention should be given effect, even if it necessitates the supplying of omissions, provided, of course, that this effectuates the legislative inten-

¹¹³ *Snowden v Thompson*, 106 Ark. 517, 153 S.W. 823; *In re Barnett's Estate*, 97 Calif. Ap. 138, 275 Pac. 453; *Fouracre v White*, 30 Dela. 25, 102 Atl. 186; *People v Rogier*, 326 Ill. 310, 157 N.E. 177; *Rural Independent School v McCracken (Iowa)* 233 N.W. 147; *State v Trapp*, 140 La. 425, 73 So. 255; *Thatcher v Cook*, 250 Mass. 188, 145 N.E. 256; *Dworkin v Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846; *State v Reneau*, 75 Neb. 1, 104 N.W. 1151, 106 N.W. 451; *Levberg v Schumacher*, 225 N.Y. 167, 121 N.E. 808; *Plainfield Motor Co. v Salamon*, 13 N.J. Misc. 570, 180 Atl. 428 (uniform conditional sales act); *Ex parte Brown*, 21 S.D. 515, 114 N.W. 303; *Hickman v Wright*, 141 Tenn. 412, 210 S.W. 447; *Jordan v S. Boston*, 138 Va. 838, 122 S.E. 265; *Neacy v Board of Supervisors*, 144 Wis. 210, 128 N.W. 1063. Also see §§ 191-192, *infra*.

¹¹⁴ *Jacob v U.S.*, Fed. Cas. No. 7,157; *Moore v City of Indianapolis*, 120 Ind. 483, 22 N.E. 424; *State ex rel Mickey v Reneau*, 75 Neb. 1; *Holmberg v Jones*, 7 Idaho 752, 65 Pac. 563; *Gring v Lake Drummond*, 110 Va. 752, 67 S.E. 360; *State v Crothers*, 118 Wash. 226, 203 Pac. 74.

¹¹⁵ *Birmingham Ry. Co. v Green*, 4 Ala. Ap. 417, 58 So. 801; *Hull v Hull*, 21 S.C. Eq. 174. But note *McCleary v Babcock*, 169 Ind. 228, 82 N.E. 453.

¹¹⁶ *Swift v Luce*, 27 Me. 285.

¹¹⁷ See § 159, *supra*.

¹¹⁸ See § 158, *supra*.

tion.¹¹⁹ Some decisions seem to indicate a trend in this direction,¹²⁰ and allow words omitted by oversight to be supplied, if the statute is otherwise meaningless,¹²¹ or if an amendment without interpolation is ineffective.¹²² Similarly, a plain misnomer may be corrected,¹²³ or a statute made intelligible by the addition of a word suggested by the statute.¹²⁴ It is proper for the court to supply such omissions because they are in fact a part of the statute, having been intended to be included in the statute when drafted and enacted.

Where the statute's meaning is clear and explicit, words cannot be interpolated.¹²⁵ In the first place, in such a case, they are not needed. If they should be interpolated, the statute would more than likely fail to express the legislative intent, as the thought intended to be conveyed might be altered by the addition of new words. They should not be interpolated even though the remedy of the statute would thereby be advanced,¹²⁶ or a more desirable or just result would occur.¹²⁷ Even where the meaning of the statute is clear and sensible, either with or without the omitted word, interpolation is improper,¹²⁸ since the primary source of the legislative intent is in the language of the statute.

¹¹⁹ *Gleason Coal Co. v U.S.*, 30 Fed. (2) 22; *Lane v Schomp*, 20 N.J. Eq. 82. Also see §§ 200-201, *infra*.

¹²⁰ See *McCleary v Babcock*, 169 Ind. 228, 82 N.E. 453. And note *Snowden v Thompson*, 106 Ark. 517, 153 S.W. 832; *Jackson Township v Bowman*, 196 Ind. 729, 147 N.E. 621; *Foley v Bourg*, 10 La. Ann. 129; *McCullough v Scott*, 183 N.C. 865, 109 S.E. 789. A *casus omissus* should be avoided by construction, if reasonably possible. *Young v Regents of Univ.*, 87 Kan. 239, 124 Pac. 150. And especially do the courts show an inclination to confine the rule of *casus omissus* to penal or criminal statutes, *State v Peters*, 37 La. Ann. 730, and to reject it where remedial statutes are concerned. *Rural Independent School v New Independent School*, 120 Iowa 119, 94 N.W. 284; *Landrum v Flannigan*, 60 Kan. 436, 56 Pac. 753; *Lowe v Phelps*, 14 Bush (Ky.) 642.

¹²¹ *Turner v State*, 40 Ala. 21.

¹²² *Donohue v State*, 31 Minn. 244, 17 N.W. 381.

¹²³ *Fosdick v Mayor*, 14 Ohio St. 472.

¹²⁴ *Hutchings v Commercial Bank*, 91 Va. 68, 20 S.E. 950 (word "not" added).

¹²⁵ *Smith v State*, 66 Md. 215, 7 Atl. 49.

¹²⁶ *U.S. v Chase*, 135 U.S. 255, 34 L.Ed. 117, 10 S.Ct. 756.

¹²⁷ *McKuskie v Hendrickson*, 128 N.Y. 555, 28 N.E. 650.

¹²⁸ *State ex rel Everding v Simon*, 20 Ore. 365, 26 Pac. 170. But note *Osborne v Simpson*, 94 Fla. 793, 114 So. 543; *Loper v State*, 82 Minn. 71, 84 N.W. 650.

Obviously, the reason back of the rule of *casus omissus* is found in the principle that if the court attempts to supply that which the legislature has omitted, there is considerable danger that it may invade the legislative field. It is not easy to determine whether the omission was intentional or not. And even where it was inadvertent, an attempt to supply the omission, by including the omitted case, generally would operate to add to the statute a meaning not intended by the legislature, for how can it be said that the lawmakers intended to include something omitted? It would seem that the only time the omitted case might be included within the statute's operation, would be when the legislature intended to include it but actually failed to use language which would, on its face, cover the omitted case. The inclusion would then be justified, if from the various intrinsic and extrinsic aids, the intent of the legislature to incorporate the omitted case, could be ascertained with a reasonable degree of certainty.

The application of the rule, as it is generally applied, is illustrated in *State v Trapp*,¹²⁹ where the statute in question provided that "no person, firm or corporation conducting a barroom" should permit any woman or minor child to serve therein:

"As the statute does not declare that a proprietor of a barroom or drinking saloon who permits a woman or minor child to serve in a barroom or drinking room, shall be deemed guilty of a misdemeanor, the courts cannot declare him guilty, however certain that the omission on the part of the legislature was inadvertent. Courts of justice have nothing more to do with criminal statutes than to apply them to the cases to which the legislature has declared they shall be applied. If the legislature has accidentally or inadvertently failed to express the intention that certain conduct shall constitute a crime or misdemeanor, the courts cannot correct the error or supply the omission, no matter how plainly the conduct in question is within the mischief intended to be remedied."

Of course, so far as criminal or penal statutes are concerned, especially where the rule of strict construction is applied, the courts are generally justified in refusing to extend the scope of the enactment. The same is true, probably to a lesser extent, where those civil statutes subject to strict construction are involved. The general rule, however, so far as civil statutes are concerned, is well declared in *Du Pont v Mills* (— Dela. —, 196 Atl. 168):

¹²⁹ 140 La. 425, 73 So. 255, 256.

“While the court may interpret doubtful or obscure phrases and obscure language in a statute so as to give effect to the presumed intention of the legislature, and to carry out what appears to be the general policy of the law, it cannot, by construction, cure a *casus omissus*, however just and desirable it may be to supply the omitted provision; and it will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that, without doubt, the Act would have been drawn otherwise, if the attention of the legislature had been drawn to the oversight at the time the Act was under discussion.”

§ 170. The Process of Interpretation—In General.—Obviously, there is no better way to understand the process of interpretation than to analyze it or divide it into its several steps or subprocesses. This treatment should not only reveal how the courts actually ascertain the legislative intent but should also point out the weaknesses of the process as it is now employed by the courts and indicate any trends which may exist toward making the process more effective.

Austin has divided the process into three sub-processes:¹³⁰ (1) finding the rule; (2) finding the intention of the legislature; and (3) extending or restricting the statute so discovered to cover cases which should be covered. Similarly, De Sloovere has classified the major steps in the interpretative process:¹³¹ (1) finding or choosing the proper statute or statutes applicable, including incidentally the authentication of the text; (2) interpreting the statute law in its technical sense; and (3) applying the meaning so found, to the case at hand.

Thus, in a general way, it is apparent that the interpretative process, at least logically, is made up of three major steps, although, of course, one step may play a more important part than that played by the others in the construction of a particular statute. For instance, sometimes it will be relatively easy to find the statute or rule applicable, or the intention of the legislature may be obvious. Very often the real problem will be to apply the statute. Nevertheless, before the process of interpretation is finished, each step must be taken.

§ 171. Finding the Rule or Statute Applicable.—Of course, the first step in the interpretative process is to locate the statute which

¹³⁰ Austin—Jurisprudence (3rd Ed.) Essay on Interpretation.

¹³¹ De Sloovere—Steps in the Process of Interpreting Statutes (1932) 10 N.Y.U. Law Q. Rev. 1.

will control the situation before the court.¹³² In this connection it may be necessary to select the law of one of several jurisdictions, and, having made this selection, then to select one of a number of co-ordinate bodies of law in the ascertained jurisdiction. Having ascertained the body of law applicable, the more difficult task, as a general rule, arises requiring the interpreter to find the particular statute applicable, and, in many instances, the specific provisions thereof which are relevant to the problem at hand.

In order to locate the statutory provision which is in point, it is necessary to examine the code or statute book. The discovery of the provision will depend in many cases upon the accessibility of the contents of the code or book rather than upon any scientific method of search. Frequently, the searcher may fail to find the statute which should be applied to the matter at hand, or may find only a part of the statutes in point. As a result, the failure to find the law applicable may greatly influence the construction of a statutory provision as well as determine the ultimate outcome of the litigation. It is therefore highly important that every statutory provision applicable be found, so that the constructive process may have the material upon which to work.

§ 172. Finding the Legislative Intention.—Since the purpose of construction is to ascertain the legislative intent, this constitutes the major step in the process of interpreting statutes. Finding the law applicable is simply preliminary; it merely produces the material from which the legislative intention or meaning is to be found. But ascertaining the intention of the legislature forms the very heart of the interpretative process.

¹³² DeSloovere has divided this step into three sub-processes: (a) finding the unitary body of law applicable—a problem of conflict of law; (b) finding which statute or statutes of that body of law are relevant to the particular case; and (c) determining what section or sections, paragraphs, phrases or words, in the particular case involves more directly. DeSloovere, *Steps in the Interpretation of Statutes* (1932) 10 N.Y.U. Law Q. Rev. 1. This subdivision assists considerably in understanding the first major step in the process of interpreting statutes. Also see, Kocourek, *An Introduction to the Science of Law*, § 41, p. 192: "Before a legislative declaration can be interpreted, it is necessary first to find the authoritative text. The text must be established as a whole and in every detail including the words, the order of expression, and the punctuation. No rules can be laid down to govern these matters beyond those developed by the art of historical criticism."

Throughout this treatise, we have discussed the various ways by which the meaning of statutes are to be ascertained. The first source from which the legislative intent is to be sought is the words of the statute.¹³³ Then an examination should be made of the context, and the subject matter and purpose of the enactment.¹³⁴ After the exhaustion of all intrinsic aids, if the legislative intent is still obscure, it is proper for the court to consult the several extrinsic matters for further assistance.¹³⁵ And during the consideration of the various sources of assistance, further help may, of course, be found in the use of the numerous rules of construction.

§ 173. Applying the Statute.—It is not always easy to distinguish between ascertaining the legislative intent and applying the statute. The former consists in ascertaining the legislative meaning, while the latter is the determination of whether the facts of a given case are within or without the legislative meaning previously ascertained. The old Bolognian statute which provided that whoever drew blood in the streets should be severely punished, may be taken as an illustration.¹³⁶ The meaning of the statute was clear upon its face, but its application to the barber who opened a vein in the street was not. In other words, the court was called upon to decide whether the facts of this case fell within the statute, and that was the application of the law. A more modern illustration of the application of a statute in contrast to its construction, is found in the case where the problem was pre-

¹³³ "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." *Lake County v Rollins*, 130 U.S. 662, 9 S.Ct. 651, 32 L.Ed. 1060.

¹³⁴ "The intention of the legislature in framing a statute is to be collected from the words used, the subject-matter, the effect and consequences, and the spirit and reason for the law." *Breashears v Norman*, 2 S.W. (2) 53, 54.

¹³⁵ *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829. Also see § 209, *supra*.

¹³⁶ See *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340.

sented whether a murderer might inherit from his victim,¹³⁷ even though the language of the law is clear in its apparent meaning, so that without regard to the fact that the beneficiary was the murderer of his beneficiary, he would seem clearly entitled to inherit under the expressed meaning of the law. In solving this problem, the court is called upon to determine whether the murderer shall be allowed to inherit and thus benefit by his unlawful act. That is, technically, the application of the statute and not the ascertainment of its meaning.

Since the ascertainment of the legislative intent or meaning and the application of the statute to the facts are closely connected and often seem inseparable, the separation into two distinct processes may seem artificial. The division into two processes, however, may be justified by the fact that a statute cannot be applied until the legislative intent has been ascertained. That the separation is not purely artificial is also further indicated when we realize that even an unambiguous statute must also be applied.¹³⁸ Nevertheless, in applying a statute, the court's decision depends upon the intent of the legislature—whether it intended to include or exclude the case at hand. And in ascertaining the legislative intent does not the court use the same principles that it uses when it applies the statute? Or does the court really ascertain the legislative intent before it endeavors to apply the law? Such inquiries as these indicate the close relationship of the two steps, and also indicate the difficult problem often presented to the court when it must segregate the two steps in the interpretative process.

One important reason for being able to distinguish between the application of the statute and the ascertainment of the legislative intent as therein expressed, lies in the assistance which is thereby rendered in determining the respective spheres of the court and jury in the interpretation of statutes. We have elsewhere discussed

¹³⁷ That the murderer may not inherit, see *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340; *Garwols v Bankers Trust Co.*, 251 Mich. 420, 323 N.W. 239. *Contra*: *Wall v Pfanschmidt*, 265 Ill. 180, 106 N.E. 785; *McAllister v Fair*, 72 Kan. 533, 84 Pac. 112.

¹³⁸ "Where the meaning of the statute is plain, there is no room for judicial interpretation, and the only function of the court is the application of the enactment to the facts at bar." *Riley v Robbins (Calif.)* 34 Pac. (2) 715, 716.

this subject in considerable detail¹³⁹ and consequently will not repeat it here.

It is also in the application of statutes that the problem of spurious interpretation arises.¹⁴⁰ Here, too, we find the courts assuming certain attitudes toward statutes, as represented by literal, reasonable, strict, liberal, extensive, restrictive, logical, legal, doctrinal, and sociological interpretation. By virtue of these, the court may include or exclude a case from the operation of the statute before it for application.^{140a}

§ 174. The Construction of Unambiguous Statutes.—No matter how clear and unambiguous the language of a statute is, it must be analyzed and its expressed meaning ascertained. It is also impossible to determine whether the statute has more than one meaning, or any meaning at all, without reading the language and seeking to understand it. Then, and only then, is it possible to discover the meaning of the statute and to determine whether the statute is ambiguous, and, in accord with the general rule, subject to construction. And when the meaning of a statute has been ascertained, has not interpretation already been accomplished?

Further illustrative of our contention, hundreds of words in the English language bear more than one meaning. "Few words are so plain that the context or the occasion is without capacity to enlarge or narrow their extension."¹⁴¹ We constantly express ourselves, even in statutes, in metaphors. Naturally, these factors necessitate interpretation long before we have ascertained whether the expression is ambiguous or of doubtful meaning.

¹³⁹ See § 182, *supra*.

¹⁴⁰ For a treatment of such construction, see Pound, *Spurious Interpretation* (1907) 7 Col. L. Rev. 379.

^{140a} See Sedgwick, *Construction of Statutes* (2nd Ed.), p. 318.

¹⁴¹ *Surace v Danna*, 248 N.Y. 18, 161 N.E. 315. "Human language, at best, is an imperfect medium of human thought. The greater part of the time of courts is consumed in trying to find out what the legislature meant, even where the courts and legislatures speak the same vernacular. The difficulty is doubled when ideas obscurely expressed in one language are to be turned into another." *State v Ellis*, 12 La. Ann. 390. But note this comprehensive definition of "ambiguity": "When a single word or sentence is capable of several significations, conjectures are necessary to find out the true one. Both these cases rhetoricians call ambiguous. But logicians are more nice, who, if the variety of significations lies in a word, call it equivocal; in a sentence, ambiguous." Puffendorf's Rules, as stated in Dwaris (Potter) on Statutes, p. 132.

In this connection, these comments by Dwarris in his treatise are particularly pertinent and enlightening:

“All new laws, though penned with the greatest of technical skill and passed upon the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their meaning be fixed and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of the objects and the imperfections of human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment; the use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. . . . And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.”¹⁴²

“No human wisdom can prepare a law in such a form, and in such simplicity of language as that it shall meet every possible complex case that may afterward arise. Whatever skill and forethought the most profound of human law-maker may have called to his aid, it will be found that even such law-giver, though he possess the highest of intellectual gifts will not possess grasp of mind enough to draw up . . . an enactment so perfect at the time it is drawn, that no doubtful case shall not afterwards arise as to its meaning. And as time wears on, and the wants and habits of society become changed, as they ever will change with the progressive march of intelligence . . . the interpretations, suitable to a past age, will become more and more impracticable to the present, as to all new questions.”¹⁴³

“These are propositions so well confirmed by experience, that statesmen and lawyers now agree upon the wisdom of preparing such instruments with general outline, in language clear and easily understood, rather than of attempting minute details, however, elaborately extended; the tendency of which is found in experience to contract, and often to confuse the expression of intent. It is found to be far easier to obtain the intent of the legislator, when laws are brief and clear, and to rely upon good faith and common sense for their construction, than to be embarrassed at every step with details, which prevent the application of general principles, because the spe-

¹⁴² Dwarris (Potter)—Statutes, 49, 50.

¹⁴³ Dwarris (Potter)—Statutes, 50.

cific case has not been enumerated and singled out by the law-maker." ¹⁴⁴

"It has been shown that it is impossible to word laws in such a manner as to absolutely exclude all doubt, or to allow us to dispense with construction, even if they were worded with absolute (mathematical) precision, for the time for which they were made, because things and relations change, and because different interests conflict with each other." ¹⁴⁵

An examination of the cases involving the construction of statutes will reveal that the view advanced in this section, is not wholly without support. In fact, there seems to be ample authority that a statute must be construed—whether it be ambiguous or not—in order to ascertain the legislative intent and to discover whether it can be adjudged unambiguous. Such a view seems necessarily inferable from such typical statements as these:

"It is our duty to construe this section as it is written The language of the section is unambiguous and it must determine the intent and purpose of the section." ¹⁴⁶

"But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given it." ¹⁴⁷

"In determining this question, we must first look to the specific language of the law, and if this language is plain and unambiguous on its face, susceptible of but one construction, we may not go beyond it." ¹⁴⁸

And one case seems clearly to recognize that an unambiguous statute may occasionally be subject to construction, although it does not point out such occasions:

" but where a law is plain, unambiguous, and explicit in its terms, the exceptions are few indeed that author-

¹⁴⁴ Dwarris (Potter)—Statutes, 50, 51.

¹⁴⁵ Dwarris (Potter)—Statutes, 51.

¹⁴⁶ Turner v Hagins, 250 Ky. 17, 61 S.W. (2) 899, 900.

¹⁴⁷ McCamy v Payne, 94 Fla. 210, 116 So. 267, 269. Also see to same effect, Burrill National Bank v Edminister, 119 Me. 367, 111 Atl. 423, 425: "A statute which within itself is clear should be construed as it reads."

¹⁴⁸ State v Borah (Ariz.) 76 Pac. (2) 757, 761.

ize a court to read something into it that the law writers did not themselves put therein."¹⁴⁹

Other cases apparently go so far as to actually construe statutes which are plain and unambiguous:

"It is said that when the meaning of language is plain, we are not to resort to evidence to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute."¹⁵⁰

"The act of June 30, 1879, 21 Stat. 43, providing for the selection of jurors, grand and petit, in the courts of the United States, made a great change in the law then in force. While the language of the act is clear and free from ambiguity, and for this reason there is nothing to construe, still, to carry out the true meaning and intent of the Congress which enacted it and to understand what that intent was, it is proper to ascertain the mischief supposed to prevail at that time, and which it was sought to remedy by the enactment of that statute."¹⁵¹

"Unambiguous words call for no construction, but when unambiguous words are used in such a manner as to produce ambiguous or uncertain results, or to produce a manifest injustice or absurdity, not within the reasonable contemplation of the legislature, then it is the duty of the court, in applying the law, to give it such application as is reasonably within the intent of the law."¹⁵²

¹⁴⁹ *Morrow v Asher*, 55 Fed. (2) 365, 367. Does not *U.S. v Beaver Run Co.*, 99 Fed. (2) 610, 613, point out one of the occasions?: "It is a well established doctrine that a clear, unambiguous statute must be literally construed (cases cited). If an apparently unambiguous statute contains hidden ambiguities, or if a literal construction would clearly defeat the object intended by congress, or if a literal construction would result in absurdities so gross 'as to shock the general moral sense,' then the courts may be entitled to depart from the strict wording in order to give the statute a reasonable construction."

¹⁵⁰ *Boston Sand & Gravel Co. v United States*, 278 U.S. 41, 73 L.Ed. 170, 49 S.Ct. 52, aff. 19 Fed. (2) 744, which modified 7 Fed. (2) 278 and 16 Fed. (2) 643, aff. 23 Fed. (2) 839. The above quotation is from the opinion of Mr. Justice Holmes, but there was also a strong dissenting opinion in the case.

¹⁵¹ *United States v Lewis*, 192 Fed. 639.

¹⁵² *Tillinghast v Tillinghast*, 25 Fed. (2) 531, 533. Also see *State v Thompson (Mo.)* 5 S.W. (2) 57.

It may be urged, however, that some of these cases confuse the construction with the application of the statute. But, we have already shown that the application of a statute is a step in the interpretative process and that often the two steps are so closely connected that it is practically impossible to separate them.¹⁵³ Yet, be that as it may, from a practical standpoint, every statute must be subjected to interpretation before its meaning can be ascertained, and applied. Some of these cases surely tend to point out a trend in our law toward recognizing the realities of the process of interpretation.

Although the rule is clearly announced that only when a statute is ambiguous can statutes in *pari materia* be resorted to for assistance in ascertaining the legislative meaning, would not the court be more likely to discover the legislative intent even where the statute is unambiguous, as that term is generally used, should it be allowed to resort to all statutes pertaining to the same subject matter? It is a basic principle of construction, which cannot be criticized, that a statute must be construed as a whole. There can be no doubt that only by considering each and every word, clause and sentence, can its meaning be obtained. Similarly, can the legislative intent in a given statute, even though it seems clear upon its face, be discovered if we close our eyes to statutes in *pari materia*? After all, statutes in *pari materia* are to be taken together as if they constituted one law, and having one object in view. Only by giving proper consideration to all statutes of this type can the legislative intent be ascertained. It would seem that an act in *pari materia* should be considered a part of the statute to be construed—a part of the primary source—the language of the statute—from which the legislative intent must be derived. Such a view seems indicated in *Commonwealth v Barney* (115 Ky. 475, 74 S.W. 181):

“Even as read in entire harmony with its title, the terms of this statute are very general, and, if liberally construed and literally applied, would be most comprehensive and far-reaching. At first reading this statute may appear plain enough. But it must be studied, because practically it must be applied in connection with other statutes of this state. All criminal laws are necessarily enacted to remedy some evil existing or anticipated. Such was the situation which the legislature had in mind, that it must be deemed to have taken a comprehensive

¹⁵³ See § 173, *supra*.

survey not alone of the hurtful thing to be corrected, but of the laws already in force tending to, but which had not fully served that end. The fraudulent conversion or disposal of the property of another without his consent goes over a wide range of criminal and civil law."

Would the recognition of the technical difference between the process of construction and that of interpretation reveal any error in the statement that some courts already seem to recognize that all statutes must be construed, although in varying degrees? We have elsewhere shown that interpretation, strictly speaking, differs from construction in this: that it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects not always included in the direct expression of the text.¹⁵⁴ With this technical difference in mind, the fact that all statutes must be interpreted becomes all the more evident, particularly when we remember that words bear, in most instances, more than one meaning. And when we also remember that in common use the word "construction" is generally employed in the law in a sense embracing all that is properly covered by both interpretation and construction,¹⁵⁵ the decisions quoted from above seem undoubtedly correct. As a result, the technical distinction between interpretation and construction fails to reveal anything fatal to the correctness of the rule announced by what we might designate as "the braver courts".

§ 175. A Suggested Mode of Interpretation.—Inasmuch as every statute needs interpretation, although the degree of necessity may vary, what objection is there to recognizing the realities of the interpretative process? Why continue to announce that only where the statute is ambiguous is it subject to construction? Why should the legislative intent be defeated simply because the statute may seem clear and unambiguous upon its face, when the court could by resorting to the recognized sources of assistance and by applying any of the existing rules of construction, actually ascertain the

¹⁵⁴ See § 157, *supra*.

¹⁵⁵ "In common use, however, the word construction is generally employed in the law in a sense embracing all that is properly covered by both, when each is used in a sense strictly and technically correct". *United States v Keitel*, 211 U.S. 370, 29 S.Ct. 123, 53 L.Ed. 230, quoting from *Cooley's Constitutional Limitations* (6th Ed) p. 51.

true legislative intent? Indeed, as we have pointed out,¹⁵⁶ do not the courts already utilize the principles and rules of construction long before they decide that the statute is ambiguous or uncertain in its meaning? And having thus convinced themselves that the statute under consideration is unambiguous, do they not assert that it is not subject to construction, or having ascertained that it is ambiguous, do they not announce that it is subject to construction? Or having by this process determined the meaning of the statute, do they not then proceed to apply it to the case at hand?

Should it be admitted that all statutes are subject to construction, the legislative intention would still be primarily sought for in the statute itself—in the words used by the legislature to express its will. But the court should not be barred from resorting to extraneous facts and circumstances in order to determine if the meaning apparently expressed by the enactment was in truth the meaning intended by the lawmakers merely because the words used upon their face bear a clear, definite and sensible meaning. It is possible that such extraneous matters might reveal that the apparent meaning was not the meaning intended by the legislators. Or they might confirm the previously ascertained intention as that of the law-makers.¹⁵⁷ After all, why should not the court be allowed recourse to any possible aid which would make more certain that the suggested or apparent interpretation was the correct one, although where the extraneous matters did not dispel existing doubt, they should not control the words of the statute. Or to state the same thing conversely, extrinsic matters should control the construction of a statute plain upon its face only where such matters clearly indicated the intention of the legislature.

It would therefore seem unobjectionable to permit the court to consider extraneous matters simply to confirm an asserted construction, whether the statute upon its face was ambiguous or unambiguous. If any of the extrinsic aids to the construction of a statute, such as the history of the act, or the motives and opinions of the legislators, tend to corroborate one of two asserted meanings, it is difficult to see any reason why the court should not have

¹⁵⁶ See § 174, *supra*.

¹⁵⁷ *Boston Sand & Gravel Co. v United States*, 278 U.S. 41, 73 L.Ed. 170, 49 S.Ct. 52. And note *Maxwell v Brayshaw*, 258 Fed. 957, that congressional debates in harmony with a fair construction of an act, are highly persuasive in determining the legislative intent.

the benefit of this additional indication of the legislative intent. Similarly, if any extraneous matter supports the apparent meaning of a statute which is clear upon its face, such meaning would thereby be confirmed as the meaning actually meant by the law-makers. Moreover, this use of extrinsic aids should be proper, even though after the consideration of all intrinsic aids, no ambiguity seemed to exist. In fact, the court should be allowed recourse to any aid, whether it be intrinsic or extrinsic, at any time for corroborative purposes. Such matters shed light upon the true meaning and assist the court in finally determining which of the several meanings, if there be more than one, is that intended by the legislature.

Since all statutes must be interpreted before they can be applied, might not the rule be announced that all statutes are subject to construction, and if there be more than one possible construction, that meaning will be adopted which most reasonably seems to be the one intended by the legislature, after the court has considered all intrinsic and extrinsic aids? Since in practice this largely represents the method actually pursued by the court in its search for the legislative intent, there should be no real objection to recognizing that which already is a reality.

And what is it that most reasonably represents the legislative intent, where a statute is susceptible to two or more interpretations? Everything being equal in other respects, that interpretation should surely be accepted by the courts as constituting the one intended by the law-makers, which operates most equitably, justly and reasonably as determined by our existing standards of proper conduct and by our conceptions of what is right and what is wrong, of what is just and what is unjust. As we have stated time after time in this treatise, where a statute operates inequitably or absurdly or with some other universally recognized undesirable effect, even though it may on its face seem unambiguous, nevertheless is it not highly proper to suspect that it does not represent the will of the legislature? In the first place, our law-makers must be presumed to legislate for the equal benefit of all persons as judged in the light of our standards of proper human conduct and relationship. In the second place, at best, the legislature can only lay down general rules to cover classes of cases. The application of the law to specific controversies must be left largely to the courts, with a discretion to include or exclude the specific controversy in litigation from the operation of the statute. If to apply the stat-

ute to a pending controversy will work clear injustice, it is not unreasonable to presume that the legislature must have intended to exempt such a case and to leave the determination of the conflicting interests or rights to the court, in the light of recognized principles of ethical conduct. Often statutes, because of the inevitable generality of their terms, fail to provide a rule by which the court can administer justice. Such inadequacies must obviously be supplied by the court.

It would, therefore, seem that in determining the legislative intent, the court must not overlook the effect of the statute seemingly applicable to the case at hand. When all other aids fail, this consideration should surely provide a method by which the court can determine with reasonable certainty what is the intention of the legislature. At least, this view is in accord with reality—that all statutes are subject to interpretation—that all statutes must first have their meaning ascertained, and then their applicability determined, and if found applicable, applied.

§ 176. The Value of Precedents and Principles of Construction.—It has wisely been stated that the construction of statutes is “eminently a practical science”.¹⁵⁸ As a result, too much reliance upon the various maxims or principles of interpretation may operate to defeat the legislative intention rather than assist in its ascertainment and effectuation. It is extremely doubtful whether the meaning of the legislature can be ascertained with any degree of certainty by a process which seeks to find the proper “pigeonhole

¹⁵⁸ “Ours is eminently a practical science. It is only by an intimate acquaintance with its application to the affairs of life, as they actually occur, that we can acquire that sagacity requisite to decide new and doubtful cases. Arbitrary formulae, metaphysical subtleties, fanciful hypotheses aid us but little in our work. Nor do I believe it easy to prescribe any system of rules of interpretation for cases of ambiguity in written language, that will really guide the mind in the decision of doubt. . . . It would seem as vain to attempt to frame positive and fixed rules of interpretation, as to endeavor in the same way, to define the mode by which the mind shall draw conclusions from testimony.” Sedgwick, *Construction of Statutes* (2nd Ed.) p. 192. “And most of the current maxims stated in text books and judicial opinions are of little value. Modern codes have wisely refrained altogether from formulating general principles of construction.” Freund, *Interpretation of Statutes* (1916) 65 Pa. Law Rev. 207, 217. But do modern codes now refrain from formulating general principles of construction? See § 367, *infra*.

for each concrete cause.”¹⁵⁹ Similarly, blind reliance upon precedent will not necessarily assure the discovery of the legislative intent.¹⁶⁰ Perhaps the proper position of both precedent and principle of interpretation is set forth in the following quotation:

“It is a mistake to treat statutory construction like other branches of the common law, as a body of doctrine to be gathered from particular precedents and judicial utterances; the only proper method of approaching the problem is the inductive one, gathering from the mass of decisions certain tendencies and seeking to determine whether some of these tendencies are strong enough to impose themselves upon courts by reason of inherent fitness and necessity.”¹⁶¹

Of course, the various rules of construction, if properly used, will be of considerable assistance to the court. They are based on human experience and probability. Precedent may show us the

¹⁵⁹ Pound, *Enforcement of Law*, 20 *Green Bag*, 401, 404, referring to the “literal school” of interpretation. He also discusses two other schools; the historical and the equitable. Those who adhere to the historical school expound the law by an inquiry into the pre-existing law and the history and development of the competing juristic theories among which the framers of the law had to choose. By virtue of the equitable school, the legislative rule is a general guide to the judge, leading him toward the just result, but it insists that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men. It insists that application of law is not a purely mechanical process.”

¹⁶⁰ Freund, *Interpretation of Statutes* (1916) 65 *Pa. L.Rev.* 207, 17.

¹⁶¹ *Ibid.* Also note the following language from the dissenting opinion of Justice Brandeis in *Olmstead v United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376: “Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evils had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedents into impotent and lifeless formulas. Rights declared in words might be lost in reality.”

way other courts have approached and solved the problem at hand, and may point out new approaches. Precedent may make it possible for us to avoid the error into which others have fallen. But blind adherence to precedent, will necessarily tie the courts to the past.

“The dependence of the statutes upon the will of the judges for their effect is indicated by the expression often used, that interpretation is an art and not a science; that is, that the meaning is derived from the words according to the feeling of the judges, and not by any exact and foreknowable processes of reasoning. Undoubtedly rules for the interpretation of statutes have been sometimes laid down, but their generality shows plainly how much is left to the opinion and judgment of the court. Thus, Savigny’s three aids to interpretation are: First, the consideration of the law as a whole; Second, the consideration of the reasons of the statutes; Third, the excellence of the result reached by a particular interpretation. But their lack of precision he himself notes, saying that the application of the second rule calls for much reserve, and that the third must be kept within the narrowest limits.”¹⁶²

Considering the interpretative process as a whole, and keeping in mind that the primary purpose of construction is to ascertain the legislative intent and to make it effective, can any real objection be raised to allowing the court sufficient discretion to select that construction which will meet the equities of the controversy? After all, does not the law presume that the legislature intended that its enactments will operate justly and equitably?¹⁶³ And is not the ultimate legislative intent—the great general intent behind all legislation—to do justice among men? Unless, the court can consider the equities of the situation, how can this basic intent be ascertained and made effective? Numerous cases may be found where the court does this very thing. Again the inquiry becomes pertinent: why not face the realities of the interpretative process?

§ 177. The Effect of the Statute.—Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice,¹⁶⁴ it would seem that the effect of the statute should be of primary concern. If this is so, the effect of a suggested construc-

¹⁶² Gray, *The Nature and Sources of the Law* (2nd Ed.) 176, 178.

¹⁶³ See § 177, *infra*.

¹⁶⁴ See § 179, *infra*.

tion is an important consideration and one which the court should never neglect.

Consequently, where the language of the statute is ambiguous or susceptible to more than one construction, the court should not hesitate to consider the consequences which will follow the adoption of a particular construction, in determining the question whether the asserted construction represents the legislative intent.¹⁶⁵ In a case of this character, the propriety of this action would seem clearly beyond doubt.¹⁶⁶ But where the language is plain and without ambiguity and susceptible to only one possible meaning or construction, that construction should be accepted by the court without regard to the result or effect of such acceptance, according to a multitude of decisions.¹⁶⁷ In other words, an undesirable effect

¹⁶⁵ McDonald v Wasson (Ark.) 67 S.W. (2) 722; Local Realty Co. v Steele (Utah) 62 Pac. (2) 558.

¹⁶⁶ Mitchell Produce Co. v Morrison (S.D.) 257 N.W. 47.

¹⁶⁷ Bate Refrigerating Co. v Sulzberger, 157 U.S. 1, 15 S.Ct. 508, 39 L.Ed. 601; U.S. v Missouri Pac. R. Co., 278 U.S. 269, 49 S.Ct. 133, 72 L.Ed. 322; Age-Herald Pub. Co. v Huddleston, 207 Ala. 40, 92 So. 193, 37 A.L.R. 898; Walker v Allred, 179 Ark. 1104, 20 S.W. (2) 116; Bailey v City of Hermosa Beach, 183 Calif. 757, 192 Pac. 712; City of Decatur v German, 310 Ill. 591, 142 N.E. 252; Smith v Timmons, 77 Ind. Ap. 448, 132 N.E. 319; The Peterson Co. v Freeburn, 204 Iowa 644, 215 N.W. 746; Dudley v Reynolds, 1 Kan. 285; Shelby v Costine, 174 Ky. 504, 192 S.W. 626; Betz v K.C. Southern R. Co., 314 Mo. 390, 284 S.W. 455; State v Bratton, 90 Neb. 382, 133 N.W. 429; Douglass v Essex County, 38 N.J.L. 214; Kearney v Vann., 154 N.C. 311, 70 S.E. 747; People v DeFornaro, 119 N.Y.S. 746, 65 Misc. 457; People's Bank v Loven, 172 N.C. 666, 90 S.E. 948; Morris Coal Co. v Donley, 73 Ohio St. 298, 76 N.E. 945; State v King, 137 Tenn. 167, 191 S.W. 352; State v Franklin County Sav. Bank, 74 Vt. 246, 52 Atl. 1069; Kain v Ashworth, 119 Va. 605, 89 S.E. 857; Mellen Lumber Co. v Industrial Comm., 154 Wis. 114, 142 N.W. 187; State v Gaines, 136 Wash. 610, 241 Pac. 12. "Arguments drawn from impolicy or inconvenience, ought to have little weight. The only sound principle is to declare it a *lex scripta est*, to follow and obey. Nor if a principle so just could be overlooked, could there be well found a more unsafe guide in practice, than mere policy and convenience. Men, on such subjects, complexionally differ from each other; the same men differ from themselves at different times. The policy of one age may ill suit the wishes or the policy of another. The law is not to be subject to such fluctuations." Story, Conflict of Law, 17.

cannot change the meaning of the language which is plain, for the legislative intent must be found in the latter rather than in the former.

If we assume—as we must—that the law-makers are conscientious, in event the statute is ambiguous and subject to several constructions, that one which operates in a harsh, unreasonable or absurd manner certainly does not represent the legislative intent. The basic and underlying purpose of all legislation, at least in theory, is to promote justice. Because it must be presumed that the legislature has acted for the welfare of the people, the presumption that its enactments were not intended to operate other than for the best interest of the people is well founded.

As a result, the court should strive to avoid a construction which will tend to make the statute unjust,¹⁶⁸ oppressive,¹⁶⁹ unrea-

¹⁶⁸ Knowlton v Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969; In re Blaylock, 31 Fed. (2) 612; Age-Herald Co. v Huddleston, 207 Ala. 40, 92 So. 193, 37 A.L.R. 898; People v Ventura Ref. Co. 204 Calif. 286, 268 Pac. 347, 283 Pac. 60; People v DeGuelle, 47 Colo. 13, 105 Pac. 1110; Chicago v Mayer, 290 Ill. 142, 124 N.E. 842; Murphy v Gault, 179 Ind. 658, 101 N.E. 632; State v McGraw, 191 Iowa 1090, 183 N.W. 593; Goodpaster v U.S. Morg. Co., 174 Ky. 284, 192 S.W. 35; Pierce v Bangor, 105 Me. 413, 74 Atl. 1039; Attorney General v Marx, 203 Mich. 331, 168 Mich. 1005; Miers v Miers (Miss.) 133 So. 133; Bassen v Monckton, 308 Mo. 641, 274 S.W. 404; Fischbach Brewing Co. v St. Louis (Mo. Ap.) 95 S.W. (2) 335; Owen v Main, 92 Neb. 258, 138 N.W. 154; In re Meyer, 209 N.Y. 386, 103 N.E. 713; State v Earnhardt, 170 N. C. 725, 86 S.E. 960; Ohio Mut. Ins. Co. v Marietta Woolen Factory, 1 Ohio Dec. (Reprint) 577; Lydick v State Banking Bd., 118 Tex. 168, 11 S.W. (2) 505, 12 S.W. (2) 954; Martz v Rockingham County, 111 Va. 445, 69 S.E. 321.

¹⁶⁹ Commercial Credit Co. v Fait, 2 Fed. (2) 862; Ex parte Rowe, 4 Ala. Ap. 254, 59 So. 69; Petitions of Warrington (Del.) 179 Atl. 505; Glencoe v Olson, 317 Ill. 263, 148 N.E. 78; Oliphant v Hawkinson, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; Phillips v Baltimore, 110 Md. 431, 72 Atl. 902; State v Sanderson, 280 Mo. 258, 217 S.W. 60; Chartz v Cardelli, (Neb.) 291 Pac. 311; Bayonne Textile Corp. v Am. Federation of Silk Workers, 116 N.J. Eq. 146, 172 Atl. 551, 92 A.L.R. 1450 (N.I.R.A.); Jacobus v Colgate, 217 N.Y. 235, 111 N.E. 837; State v Earnhardt, 170 N.C. 725, 86 S.E. 960; Hall v State, 124 Tenn. 235, 137 S.W. 500; Austin v Strong, 117 Tex. 263, 1 S.W. (2) 872, 3 S.W. (2) 425.

sonable,¹⁷⁰ absurd,¹⁷¹ mischievous,¹⁷² or contrary to the public interest.¹⁷³ That construction should be accepted which will make the statute effective and productive of the most good, as it is presumed that these results were intended by the legislature.¹⁷⁴ In order to carry out the legislative intent, it is therefore apparent that the statute should be given a rational, logical and sensible interpreta-

¹⁷⁰ *In re Blaylock*, 31 Fed. (2) 612; *Erwin v State* (C.C.A.-Ala.) 80 Fed. (2) 432; *Hammons v Waite*, 30 Ariz. 392, 247 Pac. 799; *Karoly v Indust. Comm.*, 65 Colo. 239, 176 Pac. 284; *Galpin v Chicago*, 249 Ill. 554, 94 N.E. 961; *Story County v Hansen*, 178 Iowa 452, 159 N.W. 1000; *Boyd v Coleman*, 146 Miss. 449, 111 So. 600; *Bassen v Monckton*, 308 Mo. 641, 274 S.W. 404; *People v Hennessy*, 205 N.Y. 301, 98 N.E. 516; *Henderson v Prudden*, 180 N.C. 493, 105 S.E. 7; *Hill v Micham*, 116 Ohio 549, 157 N.E. 13; *Walton v Donnelly*, 83 Okla. 233, 201 Pac. 367; *State v Frear*, 144 Wis. 58, 128 N.W. 1061.

¹⁷¹ *In re Blaylock*, 31 Fed. (2) 612; *Flowers v U.S.* (C.C.A.-Neb.) 83 Fed. (2) 78; *State v Birmingham Waterworks Co.* 185 Ala. 388, 64 So. 23; *McBride v Kerby*, 32 Ariz. 515, 260 Pac. 435; *Standard Oil Co. v Brodie*, 153 Ark. 114, 239 S.W. 753; *Miami v Romfh*, 66 Fla. 280, 63 So. 440; *Foutch v Zempel*, 332 Ill. 192, 163 N.E. 546; *Brownlee v Princeton*, 198 Ind. 148, 152 N.E. 828; *Quinn v First National Bank*, 300 Iowa 1384, 206 N.W. 271; *Petroleum Exploration v Superior Oil Corp.*, 323 Ky. 635, 24 S.W. (2) 259; *Grosbeck v Detroit U. R. Co.*, 210 Mich. 227, 177 N.W. 726; *State v Lee*, 319 Mo. 976, 5 S.W. (2) 83; *Logan v Carnahan*, 66 Neb. 685, 92 N.W. 984, 95 N.W. 812; *Glover v Baker*, 76 N.H. 393, 83 Atl. 916; *State v Llewellyn*, 23 N.M. 43, 167 Pac. 414; *In re Rouss*, 221 N.Y. 81, 116 N.E. 782; *State v Hay*, 132 Ore. 223, 283 Pac. 753; *Settemoyer v Pennsylvania R. Co.*, 29 Pa. Dist. 156.

¹⁷² *In re Miner* (D.C.-Ill.) 9 Fed. Sup. 1.

¹⁷³ *Ex parte Haines*, 195 Calif. 605, 234 Pac. 883; *Comley v Bd. of Purchase*, 111 Conn. 147, 149 Atl. 410; *State v Southern Pac. R. Co.*, 34 N.M. 306, 281 Pac. 29; *Nye v Board of Comrs.* (N.M.) 9 Pac. (2) 1023; *People v Title Guarantee Co.*, 227 N.Y. 366, 125 N.E. 666; *Stern v Fargo*, 18 N.D. 289, 122 S.W. 403; *Albemarle County Immigration Soc. v Common.*, 103 Va. 46, 48 S.E. 509.

¹⁷⁴ *Collins v New Hampshire*, 171 U.S. 30, 18 S.Ct. 768, 43 L.Ed. 60; *Duke Power Co. v South Carolina Tax Comm.* (C.C.A.-S.C.) 81 Fed. (2) 513; *People v Admire*, 39 Ill. 251; *In re King's Estate*, 105 Iowa 320, 75 N.W. 187; *State v Canadian Pac. R. Co.*, 100 Me. 202, 60 Atl. 901; *Phillips v City of Baltimore*, 110 Md. 431, 72 Atl. 902; *Reynolds v Enterprise Transp. Co.*, 198 Mass. 590, 85 N.E. 110; *Chouteau v Mo. Pac. R. Co.*, 122 Mo. 375, 22 S.W. 458; *Nance v Southern R. Co.*, 149 N.C. 366, 63 S.E. 116; *State v Audette*, 81 Vt. 400, 70 Atl. 833. Also see *Haworth v Chapman* (Fla.) 152 So. 663, that there is a strong presumption against absurdity.

tion.¹⁷⁵ Any construction should be avoided, if possible, as contrary to the intent of the law-makers, that produces any effect at a variance with the commonly recognized concepts of what is right, just and ethical.

International Railway Company v United States,¹⁷⁶ reveals the applicability of the principle herein discussed:

"There are fewer surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule; and to find in this act a requirement that all the numerous trolleys daily operating singly from one village to another, and crossing state lines in so doing, must carry useless automatic couplers, is absurdity itself, and the argument must go to this extent."

Once the purpose of a statute has been ascertained,¹⁷⁷ the effect of an asserted construction should shed considerable light upon the proper construction. After all, it is the effect of legislation that determines how well it meets the basic requirement of all legislation and reveals the ultimate legislative intent—the just protection of the rights and liberties of men. Even where a statute is not ambiguous, within the common use of the word in the construction of statutes, the effect should tend to affirm the apparent meaning, if such effect is reasonable, logical and fair. Whenever a statute produces absurd, illogical and inequitable results, the question should immediately be asked: is this the legislative intent? But, of course, behind the rule that the statute's effect should be considered, stands the assumption that the legislature is conscientious and always acts with the best of motives. Without this assumption, the effect of a statute has very little to commend itself to the consideration of the court as an aid in the ascertainment of the legislative intent.

¹⁷⁵ *Baxter v McGee* (C.C.A.-Ark.) 82 Fed. (2) 695; *Wiseman v Arkansas Wholesale Groc. Assn.* (Ark.) 90 S.W. (2) 987; *Wooten v Oklahoma Tax Comm.* (Okla.) 40 Pac. (2) 672; *People ex rel Wood v Lacombe*, 99 N.Y. 43, 1 N.E. 599. And note especially, *Church of Holy Trinity v U.S.*, 143 U.S. 457, 13 S.Ct. 511, 36 L. Ed. 226, where the plaintiff entered into a contract with an alien to come to the United States and serve as its pastor, and pursuant to such contract the alien came to this country, and the court held that this contract did not fall within the statute making it unlawful to assist or encourage the migration of any alien, since a contrary construction would not be a sensible one.

¹⁷⁶ 238 Fed. 317, 321.

¹⁷⁷ For discussion of the legislative purpose, see § 161, *supra*.

§ 178. **The Spirit and Reason of the Law.**—Closely related to the rule which permits the court to consider the effect of the statute, is the rule which allows consideration of the spirit and reason of the law.¹⁷⁸ The effect of a suggested construction indicates, as we shall see later, whether it is in accord with the actual intent of the legislature. Actually, there seems to be but little distinction between the spirit and reason of the law and the law's purpose, or scope.¹⁷⁹ While the purpose of a statute is the reason for its enactment, the spirit or reason of the law is, perhaps strictly speaking, more closely connected to the legislative intention.

¹⁷⁸ *Mendles v Danish*, 74 N.J.L. 333, 65 Atl. 888; *Clare v State*, 68 Ind. 17. For discussion of the legislative purpose, see § 161, *supra*.

¹⁷⁹ "The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it. An instance of this is given in a case put by Cicero. There was a law that those who, in a storm, forsook the ship should forfeit all property therein, and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest, all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree that the sick man is not within the reason of the law; for the reason of making it was to give encouragement to such as would venture their lives to save the vessel; but this is a merit which he could never pretend to who neither stayed in the ship on that account nor contributed anything to its preservation." 1 Bl. Comm. 61. "It has been said that the letter of the law is its body; the spirit, the soul; and the construction of the former should never be so rigid and technical as to destroy the latter." *Dyer v Dyer*, 212 N.C. 620, 194 S.E. 278. "'All acts are to be taken by reasonable construction; and in doubtful cases, judges may enlarge or restrain the construction . . . according to the sense of the lawmakers.' For many times, things which are within the words of statutes, are not within the purview of them. Beneficial statutes, therefore, have always been taken and expounded by equity; *ultra* the strict letter, but not, it is well and wisely said, *contra* the letter. In the language of Lord Bacon, before cited, words in a statute may be taken to a foreign, but never to an unreasonable or repugnant intent. 'A person ought not to think, if he have the letter on his side that he hath the law, in all cases,' says the ancient Plowden; 'words are only verberations of the air.' 'No statute shall be interpreted so as to be inconvenient and against reason.' 'Words of a statute ought not to be expounded to destroy natural justice.'" Dwarries (Potter) on Statutes, p. 237.

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Since the intention of the legislature constitutes the law of its enactments,¹⁸⁰ it is the intention rather than the literal meaning of the statute which controls;¹⁸¹ or, as is generally said, the spirit of the statute will prevail over the strict letter.¹⁸² Consequently, cases which do not come within the strict letter of the statute, if

¹⁸⁰ *Supra*, § 159.

¹⁸¹ Thus, "beyond the seas" means "out of the state". *Cruger v Cruger* (N.Y.) 5 Barb. 225. Also see *People v Stratton*, 335 Ill. 455, 167 N.E. 31; *Oliphant v Hawkinson*, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; *In re McDonald*, 233 N.Y.S. 368, 225 Apl. Div. 403; *Wheelock v Haskell*, 98 Vt. 47, 124 Atl. 713; *White v U.S.*, 22 Fed.Supp. 821.

¹⁸² *Barrett v Van Pelt*, 268 U.S. 85, 45 S.Ct. 437, 69 L.Ed. 857; *Piedmont & N. R. Co. v U.S.*, 30 Fed. (2) 421; *Jefferson County v Hawkins* (Ala.) 168 So. 443; *Standard Oil Co. v Brodie*, 153 Ark. 114, 239 S.W. 753; *Ex parte Haines*, 195 Calif. 605, 234 Pac. 883; *Walsh v People*, 72 Colo. 406, 211 Pac. 646; *Stamford v Stamford*, 107 Conn. 596, 141 Atl. 891; *Payne v Payne*, 82 Fla. 219, 89 So. 538; *Erwin v Moor*, 15 Ga. 361; *State v Armstrong*, 38 Idaho 493, 225 Pac. 491, 33 A.L.R. 835; *People v McEldowney*, 308 Ill. 575, 140 N.E. 12; *Cyrus v State*, 195 Ind. 346, 145 N.E. 497; *Sexton v Sexton*, 129 Iowa 482, 105 N.W. 314; *Baker v Common.*, 181 Ky. 437, 205 S.W. 399; *Ardry v Ardry*, 16 La. 264; *Stewart v Small*, 119 Me. 269, 110 Atl. 683; *Crouse v State*, 130 Md. 364, 100 Atl. 361; *Somerset v Dighton*, 12 Mass. 383; *Stambaugh Township v Iron County Treas.*, 153 Mich. 104, 116 N.W. 569; *Winters v Duluth*, 82 Minn. 127, 84 N.W. 788; *St. Louis v Christian Bros. College*, 257 Mo. 541, 165 S.W. 1057; *Hevelone v Beatrice*, 120 Neb. 648, 234 N.W. 791; *Ex parte Prosolo*, 32 Nev. 378, 108 Pac. 630; *Glover v Baker*, 76 N.H. 393, 83 Atl. 916; *McCarthy v Walter* (N.J.) 152 Atl. 175; *Ex parte DeVore*, 18 N.M. 246, 136 Pac. 47; *Brustein v New Amsterdam Cas. Co.*, 255 N.Y. 137, 174 N.E. 304; *Hagood v Doughton*, 195 N.C. 811, 143 S.E. 625; *Power v Hamilton*, 22 N.D. 177, 132 N.W. 664; *Common. v Blackman*, 82 Pa. Sup. 362; *Carter v Barnes*, 87 S.E. 102, 68 S.E. 1054; *Brookings County v Murphy*, 23 S.D. 311, 121 N.W. 793; *Peay v Graham*, 162 Tenn. 153, 35 S.W. (2) 568; *Edwards v Morton*, 92 Tex. 152, 46 S.W. 792; *State v Franklin*, 63 Utah 442, 226 Pac. 674; *In re Howard*, 80 Vt. 489, 68 Atl. 513; *State v Harden*, 62 W.Va. 313, 58 S.E. 715, 63 S.E. 394; *State v Smith*, 184 Wis. 309, 199 N.W. 954. The text is illustrated in *Brammall v Lore*, 105 Vt. 352, 165 Atl. 916, where the phrase "sent by the plaintiff to the defendant" in a statute requiring the plaintiff to send a copy of the process to a non-resident defendant in an automobile accident case, included sending it by defendant's attorney, so that plaintiff need not personally send such process, since the strict letter of the statute must give way to the reason and spirit of the law.

within the spirit, will fall within the scope of the statute,¹⁸³ and cases within the letter of the statute, if without its spirit, will not come within its operation.¹⁸⁴ But this principle is not applicable if the statute is clear and unambiguous,¹⁸⁵ so that there is no doubt concerning the legislative intent. Numerous factors may, however, raise such a doubt. It may be raised where a literal meaning leads to absurdity, contradiction, or any other effect which is contrary

¹⁸³ *New York v Davis*, 7 Fed. (2) 566; *Plaster v Rigney*, 97 Fed. 12, 33 C.C.A. 25; *Lucchesi v State Board of Equalization* (Calif. Ap.) 31 Pac. (2) 800; *People v Stratton*, 335 Ill. 455, 167 N.E. 31; *Hyland v Rochelle*, 179 Ind. 671, 100 N.E. 842; *Oliphant v Hawkinson*, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; *Brackett v Chamberlain*, 115 Me. 335, 98 Atl. 933; *Whitney v Whitney*, 14 Mass. 88; *State ex rel Hammer v Wiggins*, 208 Mo. 622, 106 S.W. 1005; *State v Long*, 43 Mont. 401, 117 Pac. 104; *Glover v Baker*, 76 N.H. 393, 83 Atl. 916; *Etz v Weinmann*, 106 N.J. Eq. 209; *Glynn v Prudential Ins. Co.*, 207 N.Y. 315, 100 N.E. 794; *Brown v Miller*, 89 Okla. 287, 215 Pac. 748; *State v Polley*, 30 S.D. 528, 139 N.W. 118; *Eastern Texas Elec. Co. v Woods* (Tex. Civ. Ap.) 230 S.W. 498; *Caledonia v Kent*, 86 Vt. 151, 84 Atl. 26; *Hasson v City of Chester* (W.Va.) 67 S.E. 781; *Nicholson v Kilbury*, 80 Wash. 500, 141 Pac. 1043. And note the application of this rule in *Horneman v Brown*, 286 Mass. 65, 190 N.E. 735, where the word "witness" was held to include a party to the action, under an evidence statute.

¹⁸⁴ *In re Di Torio*, 8 Fed. (2) 279; *Birmingham v So. Express Co.*, 164 Ala. 529, 51 So. 159; *Jefferies v State*, 102 Ark. 679, 144 S.W. 514; *National Surety Co. v Schafer*, 57 Colo. 56, 140 Pac. 199; *People v McEldowney*, 308 Ill. 575, 140 N.E. 12; *Ramsey v Yount*, 68 Ind. Ap. 378, 120 N.E. 618; *Oliphant v Hawkinson*, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; *Comstock's Case*, 129 Me. 467, 152 Atl. 618; *Attorney General v Gates*, 80 N.H. 280, 116 Atl. 443; *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340; *Power v Hamilton*, 22 N.D. 177, 132 N.W. 664; *Brown v Miller*, 89 Okla. 287, 215 Pac. 748; *State v Polley*, 30 S.D. 528, 139 N.W. 118. "A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation it is not within the letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some provisions of the statute". *People ex rel Wood v LaCombe*, 99 N.Y. 43, 1 N.E. 599. This is especially true where the legislature has expressed itself in terms of general import. *People v McDonald*, 3 N.Y.S. (2) 784, 167 Misc. 670.

¹⁸⁵ *Gooden v Police Jury*, 122 La. 755, 48 So. 196; *State ex rel Liggett & Meyers v Gehner*, 316 Mo. 1075, 292 S.W. 1028; *State v Highway Comm.*, 82 Mont. 382, 267 Pac. 499; *Siren v State*, 78 Neb. 778, 111 N.W. 798; *State v Earnhardt*, 170 N.C. 725, 86 S.E. 960; *Saville v Virginia R. Co.*, 114 Va. 44, 76 S.E. 954.

to the legitimate objects of legislation. As a result, the court may consider the spirit and reason of a statute where a literal meaning would lead to absurdity,¹⁸⁶ contradiction,¹⁸⁷ injustice,¹⁸⁸ or would defeat the clear purpose of the law-makers.¹⁸⁹ It may also be used where the statute is inaccurate in the use of words or phrases,¹⁹⁰ or contains provisions inserted unintentionally.¹⁹¹ Even words may

¹⁸⁶ U.S. v Katz, 271 U.S. 354, 46 S.Ct. 513, 70 L.Ed. 986; U.S. v Chase Securities Corp., 24 Fed. (2) 500; McGrath v Kaelin, 66 Calif. Ap. 41, 225 Pac. 34; Newton's Appeal, 84 Conn. 234, 79 Atl. 742; State v Sullivan, 95 Fla. 191, 116 So. 255; Mitchell v Lowden, 288 Ill. 327, 123 N.E. 566; Woodring v McCaslin, 182 Ind. 134, 104 N.E. 759; Trainer v Kossuth County, 199 Iowa 55, 201 N.W. 66; Common. v Fenley, 189 Ky. 480, 225 S.W. 154; State v Joseph, 143 La. 428, 78 So. 663; Edberg v Johnson, 149 Minn. 395, 184 N.W. 12; Robertson v Texas Oil Corp., 141 Miss. 356, 106 So. 449; In re Hapman's Estate, 102 Neb. 550, 167 N.W. 792; State v Clark, 29 N.J.L. 96; Ex parte DeVore, 18 N.M. 246, 136 Pac. 47; Grimshaw v Gnudi, 240 N.Y.S. 199, 136 Misc. 443; State v Barnsdale, 181 N.C. 621, 107 S.E. 505; Grove v Haskell, 31 Okla. 77, 116 Pac. 805; State v Gates, 104 Ore. 112, 206 Pac. 863; In re Foster, 243 Pa. 92, 89 Atl. 819; Carter v Barnes, 87 S.C. 102, 68 S.E. 1054; Kirk v Morely, 60 Tex. Civ. Ap. 53, 127 S.W. 1109; Buzzard v Common., 134 Va. 641, 114 S.E. 664; Click v Click, 98 W.Va. 419, 127 S.E. 194; Weiberg v Kellogg, 188 Wis. 97, 205 N.W. 896. And note Crooks v Harrelson, 282 U.S. 55, 51 S.Ct. 49, 75 L.Ed. 156, that there must be gross absurdity which shocks the general moral or common sense.

¹⁸⁷ U.S. v Baltimore Post No. 2 Fed. (2) 761; Woodring v McCaslin, 182 Ind. 134, 104 N.E. 759; Common. v Vanmeter, 187 Ky. 807, 221 S.W. 211; State v So. Pac. Co., 34 N.M. 306, 281 Pac. 29.

¹⁸⁸ Newton's Appeal, 84 Conn. 234, 79 Atl. 742; Woodring v McCaslin, 182 Ind. 134, 104 N.E. 759; Baker v Common., 181 Ky. 437, 205 S.W. 399; Carbagal's Succ., 154 La. 1060, 98 So. 666, 30 A.L.R. 1231; Stewart v Small, 119 Me. 269, 110 Atl. 683; Rutter v Carothers, 223 Mo. 631, 122 S.W. 1056; State v Grimes, 98 Neb. 762, 154 N.W. 544; Carter v Whitcomb, 74 N.H. 482, 69 Atl. 779; State v Bell, 184 N.C. 701, 115 S.E. 190; Power v Hamilton, 22 N.D. 177, 132 N.W. 664; Leslie v Griffin, (Tex Civ. Ap.) 23 S. W. (2) 535, rev. 25 S.W. (2) 820; Click v Click, 98 W.Va. 419, 127 S.E. 194.

¹⁸⁹ Harper v Victor, 212 Fed. 903, 129 C.C.A. 423; Harrington v State, 200 Ala. 480, 76 So. 422; Payne v Payne, 82 Fla. 219, 89 So. 538; Clark v Murray, 141 Kan. 533, 41 Pac. (2) 1042; Lewis v Creasey Corp., 198 Ky. 409, 248 S.W. 1046; Houghton v Yocum, 40 Wyo. 57, 274 Pac. 10.

¹⁹⁰ See State v Bartholomew, 176 Ind. 182, 95 N.E. 417.

¹⁹¹ Pond v Maddox, 38 Calif. 572.

be modified, changed, rejected, or transposed by virtue of the application of this principle.¹⁹²

As will become apparent in the succeeding section,¹⁹³ there is not a great deal of difference between the principle which permits the spirit and reason to control the construction of a statute and the doctrine of equitable construction. In fact, the same result is, and can be achieved through the use of either of the two. The objections to the doctrine of equitable construction are equally applicable to the spirit and reason of the statute.

Naturally, the danger attendant upon the application of the rule which permits the spirit and reason to control, arises from a probable invasion of the legislative field or function. But a proper application of the rule does not substitute the will of the court for that of the legislature. Frequently, words of general meaning are used in a statute, words broad enough to include the act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislature intended to include the particular act.¹⁹⁴ Similarly, words may be narrow enough to exclude a certain act, yet were used by the law-makers with the intent to include the act. Unless this latent legislative intent is made effective through use of the principle that a statute should be construed according to its spirit and reason, or some

¹⁹² U.S. v So. Pac. Co., 230 Fed. 270; Graves v McConnell, 162 Ark. 167, 257 S.W. 1041; Milan v Davis, 97 Fla. 916, 123 So. 668; Smallwood v Jeter, 42 Idaho 169, 244 Pac. 149; People v Patten, 338 Ill. 385, 170 N.E. 280; Cyrus v State, 195 Ind. 346, 145 N.E. 497; Oliphant v Hawkinson, 192 Iowa 1259, 182 N.W. 805, 33 A.L.R. 1433; Common. v Fenley, 189 Ky. 480, 225 S.W. 154; Wray v Kelly, 98 Miss. 172, 53 So. 492; City of St. Louis v Murta, 283 Mo. 77, 222 S.W. 430; State v Dist. Ct., 83 Mont. 400, 272 Pac. 525; Ex parte DeVore, 18 N.M. 246, 136 Pac. 47; Archer v Equit. Life Assur. Soc., 218 N.Y. 18, 112 N.E. 433; Bristol v Bank, 21 S.W. (2) 620, 159 Tenn. 647; Morton Salt Co. v Wells (Tex. Civ Ap.) 35 S.W. (2) 454; State v Gregory (Wis.) 232 N.W. 546. "All statutes must be construed as to give effect to the evident intention of the legislature; and to prevent inconsistency, unreasonableness or unconstitutionality, it is permissible to ignore the mere letter of the statute and even to disregard or to supply words obviously inserted or omitted by mistake." In re Stockwell, 206 N.Y.S. 834, 210, Ap. Div. 753.

¹⁹³ See § 179, *infra*.

¹⁹⁴ Holy Trinity Church v U.S., 143 U.S. 457, 12 S.Ct. 511, 56 L.Ed. 226.

similar principle, there is far more danger that the intent of the legislature will thereby be defeated, than it is through the application of the rule by a court fully cognizant of the limitations of its powers.

§ 179. **Equitable Construction.**¹⁹⁵—At one time the doctrine of equitable construction was applied by the courts,¹⁹⁶ but as such it has now been generally abandoned.¹⁹⁷ By virtue of this doctrine, the letter of the law might be disregarded and its provisions extended to cases which were within the same mischief which the law undertook to remedy, even though they were not expressly included, or cases might be excepted from the statute, although covered by its terms, where they were not fairly included, on considerations of justice and reason. As is apparent from this definition, and according to Lord Coke, equitable construction may generally be divided into two kinds—expansive and contractive.¹⁹⁸ By virtue of the former, a case not within the terms of the statute but within its purpose, was included in the statute.¹⁹⁹ Though application of the latter, a case was excepted from the operation of the statute, even though it was covered by the express terms, by considering the case outside the purpose of the statute.²⁰⁰ No detailed discussion is required to show the danger accompanying the application of the doctrine of equitable construction. An encroachment on the legis-

¹⁹⁵ For history of this doctrine, see Maxwell, *Interp.* (2nd Ed.) 310; Black, *Interp. Law* (2nd Ed.) p. 57, and Loyd, *Equity of the Statute*, 58 *Pa. L.Rev.* 76 (1909).

¹⁹⁶ *Strawbridge v Mann*, 17 *Ga.* 454; *Hoguet v Wallace*, 28 *N.J.L.* 523; *Simonton v Barrell* (N.Y.) 2 *Wend.* 362. For a recent case apparently applying this principle, see *Dinkin, et al v Cornish*, 41 *Fed.* (2) 766. Also see *infra*, § 238.

¹⁹⁷ *McAllister v Fair*, 72 *Kan.* 533, 84 *Pac.* 112; *Collins v Carman*, 5 *Md.* 503; *Sullivan v Sullivan*, 106 *Mass.* 474; *Perry v Strawbridge*, 209 *Mo.* 621, 108 *S.W.* 641; *Tompkins v First Nat. Bank*, 18 *N.Y.S.* 234; *Encking v Simmons*, 28 *Wis.* 272. Note, however, *Smiley v Sampson*, 1 *Neb.* 56. Also see *State v O'Neil*, 147 *Iowa* 513, 126 *N.W.* 454; *State v Comptoir*, 51 *La. Ann.* 1272, 26 *So.* 91.

¹⁹⁸ See *Sedgwick, Stat. Constr.* 265. Also see *Riggs v Palmer*, 115 *N.Y.* 506, 22 *N.E.* 188, 5 *L.R.A.* 340.

¹⁹⁹ *Strawbridge v Mann*, 17 *Ga.* 454; *Hoguet v Wallace*, 28 *N.J.L.* 523.

²⁰⁰ *Wiley v Kelsey*, 3 *Ga.* 274; *Riggs v Palmer*, 115 *N.Y.* 506, 22 *N.E.* 188, 5 *L.R.A.* 340.

lature is apt to occur.²⁰¹ And the beneficial results that were attainable under this doctrine are now obtained by the courts largely through the use of other principles or rules of construction.²⁰²

An excellent relatively recent application of the doctrine of equitable construction will be found in *Riggs v Palmer* (115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340) where a murderer was not permitted to inherit from his victim, although the statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, would give the property to him. In limiting the statute pertaining to the devolution of property the court thus laid down the rule:

“ . . . and it is said in Bacon:
“by an equitable construction, a case not within the letter of the statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers

²⁰¹ “The extent to which this equitable power of the courts was claimed to prevail over the words of the law is shown by the broad statement, made chiefly in reference to the construction of the more ancient statutes, which laid down general rules in the fewest words, that ‘judges have power over statute laws, to mould them to the truest and best use, according to reason and best convenience,’ which, of course, would be nothing less than a direct usurpation by the courts of the powers as well as the discretion of the legislature.” Black—Interp. Laws, p. 58 (2nd Ed.). See also *Monson v Chester*, 22 Pick. (Mass.) 385; *State v Woodside*, 112 Mo. Ap. 451, 87 S.W. 8. “Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.” *Rambo v First Nat. Bank*, 88 Kan. 257, 128 Pac. 182.

²⁰² *Dinkins v Cornish*, 41 Fed. (2) 766; *Shellenberger v Ransom*, 31 Neb. 61, 47 N.W. 700, 10 L.R.A. 810, 41 Neb. 631, 59 N.W. 935, 25 L.R.A. 564; *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340; *Tompkins v First Nat. Bank*, 18 N.Y. Supp. 234; *Encking v Simmons*, 28 Wis. 272. And see *State v O’Neil*, 147 Iowa 513, 126 N.W. 454: “Before there was any separate equity jurisdiction, and when the term equity was used as a mere synonym of equality and justice, the courts interpreted statutes with a view to their equity, and not merely in accordance with their strict terms; so that the case might be within the equity of a statute, although not expressly covered by it, and, vice versa, the statute might be held not applicable in its equity, although its strict terms covered the case. The term ‘equity of a statute’ has fallen in disuse since the establishment of a system of equity jurisprudence, but the courts have not ceased in either branch of their jurisdiction to give consideration to the general purpose of the law makers as furnishing a guide to interpretation.”

could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto.' In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter.'

From this it is easily seen that the courts still follow the same process in the interpretation of statutes, although they may generally disapprove the doctrine of equitable construction. This is apparent when one considers the action of the court when it subjects a statute to a strict or liberal construction, or when it excepts or includes a particular case by construing the law with reference to its purpose, spirit, reason, and the like. It would, therefore, seem that the doctrine of equitable construction is no more susceptible to fatal criticism than many of the other rules or principles of construction. Even though by name the doctrine may be refused application, actually it is still used.

The fact that the courts achieve the same results through the use of other principles of construction,²⁰³ evidences that the doctrine of equitable construction is founded upon something which is real. The doctrine, and those principles which the courts use to attain the same results, may be justified by simply recognizing that the legislature, if it performs its function properly, has as its ultimate intent the enactment of laws founded on recognized concepts of justice, common sense and reason—all of which operate to control

²⁰³ See § 178, *supra* for discussion of the spirit and reason of the law. And particularly note the following from Dwaris (Potter) on Statutes, p. 289: "In law, all cases cannot be foreseen or expressed; the object of interpreting laws by what is called equity, is to supply as far as possible this deficiency, by a recurrence to natural principles of justice. It is the same with cases excepted by reason and necessity, out of the prescribed rules. There are other maxims of interpretation relating to this subject of expounding statutes by equity, deserving of notice; though such doctrines, founded sometimes upon principle or adjudged cases, sometimes also depend upon mere dicta, or very questionable authorities."

the legislature in the performance of its law-making function. These concepts are those adhered to by the people of the state. Civilized society is founded upon certain standards of ethical conduct. The people have rather definite ideas of what is just and proper, and laws must, in a democracy, harmonize with the general aims and standards of the people. It must be assumed that the law-makers, who represent the people, enact all laws in the light of what the people believe is honest, fair and equitable and in harmony with the public welfare. In other words, the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently, where the statute or a suggested construction operates harshly, ridiculously, or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent, or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, in addition to the apparent or suggested meaning, there is little reason to believe that it represents the legislative intent.

If the basic legislative intent is to promote or advance the people's standards of justice and propriety, then it is surely proper for the courts to be concerned with such intent. All laws should, as a result, be construed with reference to this intent. On this basis, the application of the doctrine of equitable construction, be it known by that name or some other, may be sustained.

Of course, as we have already suggested, there is danger that the court may mould the law to its own notion of justice and propriety or disregard its positive mandates, on considerations of hardship or inconvenience. Obviously, there may be some difficulty in ascertaining the standard of justice and propriety back of the legislative act. And occasionally the legislature may intend to enact a law which as intended operates inequitably or harshly. It is not necessarily easy to distinguish such instances from those where the legislative intention, even though not expressed, actually is intended to promote justice.

Perhaps the courts should take a middle ground. If the statute violates standards of justice and propriety concerning which men agree generally, such a construction should not prevail. Sim-

ilarly, if the construction is absurd, ridiculous, or viciously unjust, it should not be accepted. In those cases, where the effect is not necessarily contrary to our common concepts of right and reason, it may be desirable that something else indicate that the asserted construction does not represent the legislative intent in addition to the undesirable result, before the court departs from the literal meaning of the language of the legislature.

§ 180. Who May Exercise the Power of Construction—In General.—Normally, the power to interpret statutes is a judicial function,²⁰⁴ and does not fall within the province of the legislature.²⁰⁵ On the other hand, the executive department of government is frequently called upon to interpret statutes long before they appear in court for judicial construction. While the interpretation placed upon a statute by the executive department is not absolutely binding upon the courts, as we shall hereafter see, it is entitled to great weight and is often accepted by the judiciary.²⁰⁶

The legislature has by means of declaratory and expository acts attempted to direct the courts as to the construction to be placed upon its enactments.²⁰⁷ The question at once arises whether this constitutes an exercise of the judicial function.²⁰⁸ As a general rule, declaratory or expository statutes are invalid if they have a retroactive effect,²⁰⁹ and especially if they operate so as to change an interpretation of existing law as made by the courts,²¹⁰ or to

²⁰⁴ *Ogden v Blackledge*, 2 Cranch. (U.S.) 272, 2 L.Ed. 276. Also see § 13, *supra*.

²⁰⁵ *People v Kipley*, 171 Ill. 44, 49 N.E. 229, 41 L.R.A. 775; *Russell v Ledsam*, 153 Eng. Rep. 604.

²⁰⁶ See *infra*, § 219.

²⁰⁷ See § 208, *infra*, for further discussion of such acts. Also see Chapter XXXI, § § 367-431, *infra*.

²⁰⁸ See Freund, *Interpretation of Statutes* (1917) 65 Pa. L.Rev. 207.

²⁰⁹ *Ogden v Blackledge*, 2 Cranch (U.S.) 272, 2 L.Ed. 276; *People v Kipley*, 171 Ill. 44, 49 N.E. 229, 41 L.R.A. 775; *Trask v Green*, 9 Mich. 358; *Meyer v Berlandi*, 39 Minn. 438, 40 N.W. 513; *Kern v Sup. Council*, 167 Mo. 471, 67 S.W. 252; *People v N.Y.*, 16 N.Y. 424; *Houston v Bogle*, 32 N.C. 496; *Common. v Warwick*, 172 Pa. 140, 33 Atl. 373; *State v Harden*, 62 W.Va. 313, 58 S.E. 715, 60 S.E. 394.

²¹⁰ *Skinner v Holt*, 9 S.D. 427, 69 N.W. 595; *Handley's Estate*, 15 Utah 212, 49 Pac. 829; *Martin v S. Salem Land Co.*, 94 Va. 28, 26 S.E. 591.

destroy or impair pre-existing or vested rights.²¹¹ Such acts, if not retroactive in operation, are permissible.²¹² And even though an act is void retrospectively, it may be valid, according to some authorities, so far as future cases are concerned.²¹³ Other authorities adhere to the view that the legislature cannot bind the courts to a particular construction of an existing law, unless the declaratory act amounts to an amendment, even though the declaratory act is confined solely to prospective operation.²¹⁴ The latter view would seem more consonant with the real nature of judicial power and hence to be preferred.²¹⁵

²¹¹ *Virginia Coupon Cases*, 25 Fed. 647; *State v Schlenker*, 112 Iowa 642, 84 N.W. 698; *James v Rowland*, 52 Md. 462; *Kern v Sup. Council*, 167 Mo. 471, 67 S.W. 252; *Weisberg v Weisberg*, 98 N.Y.S. 260, 112 Ap. Div. 231; *Common. v Warwick*, 172 Pa. 140, 33 Atl. 373.

²¹² *McCleary v Babcock*, 169 Ind. 228, 82 N.E. 453; *State ex rel Trustees*, 37 Ohio St. 275. And see also *McLeod v Burroughs*, 9 Ga. 213.

²¹³ *McNichols v U.S. Mercantile Reporting Agency*, 74 Mo. 457; *The Schooner Aurora Borealis v Dobbie*, 17 Ohio 124; *Lambertson v Hogan*, 2 Pa. 22.

²¹⁴ *State v Parsons*, 206 Iowa 390, 220 N.W. 328; *Lincoln Building & Loan Assoc. v Graham*, 7 Neb. 173.

²¹⁵ "The legislature does have power to prescribe legal definitions of its own language, and it may be conceded that when a legislative act embodies a definition, it is binding on the courts. However, the legislature has no power to direct the judiciary in the interpretation of existing statutes. While a legislative construction of an act is entitled to due consideration from courts, it is in no sense binding on the courts". *State v Parsons*, 206 Iowa 390, 220 N.W. 328. And see *Common. v Warwick*, 172 Pa. 140, 33 Atl. 373: "But the 'purpose' of every statute as of all other instruments must be gathered from the language used; and this act undertakes to give a new and final interpretation to the act . . . and direct the courts to adopt that interpretation in all cases which come before them. Obedience to this order is an abandonment of a principle which is vital to the preservation of our system of government." "As the legislature cannot," says Judge Cooley in *Const. Lim.*, 114, "set aside the construction of the law already applied by the courts to actual cases, neither can it compel courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. One of the fundamental principles of all our governments, is that the legislative power shall be separate from the judicial. If the legislature could prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial but to the legislative judgment."

§ 181. **The Court and Jury.**—As a general rule, the interpretation or construction of a statute is a matter for the court,²¹⁶ and not for the jury.²¹⁷ But there is frequently considerable difficulty in determining the respective duties of the court and jury in many cases involving statutes subject to construction. If words of common speech rather than those of a technical nature are involved, their construction is a question of law for the court.²¹⁸ But technical words—trade, commercial, scientific, etc., whose meaning must depend upon the testimony of expert witnesses—present a question of fact for the jury,²¹⁹ although, at the same time, a ques-

²¹⁶ *Northern Pac. R. Co. v Finch*, 225 Fed. 676; *Sierra County v Nevada County*, 155 Calif. 1, 99 Pac. 371; *Christiansen v Williams*, 223 Ill. 142, 79 N.E. 97; *Murphy v Gilman*, 204 Iowa 58, 214 N.W. 679; *Boston v Boston Elec. R. Co.*, 213 Mass. 407, 100 N.E. 601; *Albert v Gibson*, 141 Mich. 698, 105 N.W. 19; *Rose v Franklin Life Ins. Co.*, 153 Mo. Ap. 90, 132 S.W. 613; *Bush v Delaware R. Co.*, 166 N.Y. 210, 59 N.E. 838; *Goins v Indian Normal School*, 169 N.C. 736, 86 S.E. 629; *Blake v Wilson*, 268 Pa. 469, 112 Atl. 126, 15 A.L.R. 726; *Russell v Farquhar*, 55 Tex. 355; *Zappala v Industrial Ins. Comm.*, 82 Wash. 314, 144 Pac. 54; *Berliner v Waterloo*, 14 Wis. 378. Note especially *Winchell v Town of Camillus*, 190 N.Y. 536, 83 N.E. 1134. "We are unable to perceive how the legal meaning or effect of a statute can be a question of fact for a jury. We had supposed it was always a question of law for the court," and *State v Parsons*, 206 Iowa 390, 220 N.W. 328: "We discover no reason why this statute should find a place in the instructions of the court in a case involving an alleged violation of the prohibitory liquor law. The jury has nothing to do with construing the law. That is the function of the court." And note *State v Kinkead*, 57 Conn. 173, 17 Atl. 855: "But it is claimed that it was the duty of the court to construe the statute, and submit its construction to the jury. That might be so, if the statute was ambiguous. But it is not. It is in plain language, and free from uncertainty. Whatever doubt there is, arises from the circumstances of the case. That being so, it was for the jury to say whether the place in question was a part of the premises." Also see *Katzman v Common.*, 140 Ky. 124, 130 S.W. 990.

²¹⁷ *Thorp v Craig*, 10 Iowa 461; *City of Peoria v Calhoun*, 29 Ill. 317; *State v Patterson*, 134 N.C. 612, 47 S.E. 808; *Bryne v Bryne*, 3 Tex. 336; *Large v Orvis*, 20 Wis. 696. Also see cases under note 147, *ibid.* And apparently *contra*: *Katzman v Common.*, 140 Ky. 124, 130 S.W. 990.

²¹⁸ *Maron v Prather*, 23 Wall. (U.S.) 492, 23 L.Ed. 121; *Marvel v Merritt*, 116 U.S. 11, 29 L.Ed. 550, 6 S.Ct. 207; *Nix v Hedden*, 39 Fed. 109; *Savannah F. & W. Ry. Co. v Daniels*, 90 Ga. 608, 17 S.E. 647, 20 L.R.A. 416; *State v Baldwin*, 36 Kan. 1, 12 Pac. 318.

²¹⁹ See *Neilson v Hartford*, 8 Mies & W. 806. But note *Katzman v Comm.*, 140 Ky. 124, 130 S.W. 990, and *Sullivan v Boston*, etc., R. Co., 210 Mass. 229, 96 N.E. 347.

tion of law is presented to the court: what effect does the meaning have upon the statute?²²⁰ And so far as foreign laws are concerned, there has been considerable confusion regarding the respective spheres of the court and the jury.²²¹ Since foreign laws must be proved like any other fact in a trial, the best rule is the one which considers it the province and duty of the court to instruct the jury as to the meaning and effect of a foreign law, when proved—whether the law is written or unwritten but that the proof must be made to the court and not to the jury,²²² particularly where the evidence of the foreign law consists of a single statute or a decision of a court, the language of which is not in dispute.²²³ It

²²⁰ *Eaton v Smith*, 20 Pick. (Mass.) 150; *McNichols v Pac. Exp. Co.*, 12 Mo. Ap. 401; *Pitney v Glens Falls Ins. Co.*, 65 N.Y. 6.

²²¹ See Note, 34 A.L.R. 1453, and Register, *Judicial Powers of Interpretation under Foreign Codes* (1916) 65 Pa. L.Rev. 39.

²²² *Charlotte v Chouteau*, 25 Mo. 465. Also see *Cecil Bank v Marry*, 20 Md. 287; *Gibson v Manuf. Fire Ins. Co.*, 144 Mass. 81, 10 N.E. 729; *Kiline v Baker*, 99 Mass. 253; *Moore v Gwynn*, 27 N.C. 187. "All matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The courts are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of these laws, the courts are to judge of their applicability, when proved in the case in hand." Story—*Conflict of Laws* (8th Ed.) § 638. And see *Hooper v Moore*, 50 N.C. 130: "We are aware that an impression prevails to some extent, that the proof is made to the jury. This originated from the expression 'to be proved as facts' and many loose dicta are to be met with, scattered through the books, in which these words have been inadvertently added to, so as to make the expression 'to be proven as facts to the jury.' . . . If the law be written, and its existence is properly authenticated, the court, availing itself of the aid of the judicial decisions of the country, puts a construction on it, and explains its meaning and legal effect, the jury have nothing to do with it, save to follow the instructions of the court, as if it was our own law. If the law is unwritten, and its existence is presumed or admitted, then the jury have nothing to do with it . . . But if the existence of an unwritten law of another state, or foreign country, is not presumed or admitted, then its existence must be proved by competent witnesses, and the jury must then pass upon the credibility of the witnesses, and it is the province of the court to inform the jury as to the construction, meaning, and legal effect of the law, supposing its existence to be proved; and to this end, the court should avail itself of the judicial decisions of the state or country."

²²³ *Wylie v Cotter*, 170 Mass. 356, 49 N.E. 746; *Charlotte v Chouteau*, 25 Mo. 465.

is only where the credibility of witnesses is involved in the proof of an unwritten law of a foreign state that a question is presented to the jury for its determination.²²⁴

§ 182. **Rules for Ascertaining Questions for the Jury.**²²⁵—An examination of the various decisions pertaining to the functions of the judge and the jury in the interpretation of statutes, as we have already stated,²²⁶ indicates considerable confusion in the law. Prof. Frederick J. de Sloovere, however, has thoroughly analyzed the problem,²²⁷ and has announced certain rules which seem logically correct, although even their application is not so simple. In his opinion, many of the difficulties that are presented in determining what matters are for the court and what matters are for the jury, are due in part to confusing the interpretation and application of statutes. He lays down three propositions. First, interpretation is factual so far as it is a process of determining actually, without any influence of law or legal construction, what the parties meant;²²⁸ thus, it is always a question of fact, even though it is sometimes for the court and sometimes for the jury, as to the context or extent of the meaning of a particular non-legal word or phrase in a statute

²²⁴ *Hooper v Moore*, 50 N.C. 130. But see *Wylie v Cotter*, 170 Mass. 356, 49 N.E. 746: “. . . but where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inference may be drawn from them, the question is one of fact and not one of law.” Also note *Dyer v Smith*, 12 Conn. 384: “The construction given to a statute of another state, whether by usage or by judicial decision, is a part of the unwritten law of that state, and as such it may be proved by parol testimony and must be found by the jury.” Apparently contra: *Geogehan v Atlas Steamship Co.*, 10 N.Y.S. 121. See also *State v Jackson*, 13 N.C. 563: “But when the existence and terms of the foreign law have been proved as facts, and there is no evidence as to the construction put upon it at home, or when for any reason that construction is not to be followed, but the trial court must construe the law, then there is presented a question which the jury are not concerned with but it belongs exclusively to the court.” Note also *Cobb v Griffith*, 87 Mo. 90; *Ames v McComber*, 124 Mass. 85.

²²⁵ Also see Freund, *Interpretation of Statutes* (1917) 65 Pa. L.Rev. 207.

²²⁶ See §§ 180-181, *supra*.

²²⁷ De Sloovere, *Functions of Judge and Jury In The Interpretation of Statutes* (1933) 46 Harv. L.Rev. 1086.

²²⁸ See *Common. v Wright*, 137 Mass. 250, where the jury were permitted to determine whether a certain game was a lottery within the meaning of a statute.

as distinguished from its legal interpretation. Secondly, it is legal interpretation, and hence for the court, so far as rules of law or of construction are necessary to determine the meaning of the whole statute;²²⁹ so that any question as to the existence of a statute, the time when it takes effect, or what its precise terms are, constitutes matters of law for the court. In other words, if the interpretation demands the use of legal principles of construction and the rules of law, it requires a knowledge not possessed by a layman, so that the problem is one for the court, whether apart or in conjunction with grammar, dictionaries, reason, logic and common sense. Thirdly, concerning what may be the legal effect of what the statute states and means—what effect rules of law may have upon the meaning already found—is always a question for the court.²³⁰ Having thus analyzed the problem, he goes on and states, undoubtedly correctly, that so far as the interpretation of statutes is a question of law it is for the court, and so far as it is one of fact, it may be either one for the jury or one for the court. All preliminary questions of fact as well as of law are for the court. Thus, it is for the court to determine whether a statute is clear enough to be given to the jury without explanation.²³¹ Similarly, questions concerning the choice of laws, their constitutionality, whether a statute has taken effect, or has been repealed, or properly enacted, are all questions for the court.^{231a} The same is true with reference to the judicial notice of general and public statutes as well as the proof of the private acts of the forum. The existence of a foreign law is a question of fact for the court. And when a statute is susceptible of more than one reasonable meaning, harmonizing or choosing from among the conflicting meanings, is always a question of fact for the court. On the other hand, finding the proper non-legal meaning of particular words or phrases may be left to the jury.²³²

It is suggested that the ascertainment of the meaning, that is, the content and extent of popular or commercial terms, if they are not affected by anything else in the statute, is most adequately done by those charged in the particular case with applying that statute,

²²⁹ U.S. v Chase, 135 U.S. 255.

²³⁰ Eaton v Smith (Mass.) 20 Pick. 150.

²³¹ Tolland v Willington, 26 Conn. 578.

^{231a} Hurt v Cooper (Tex.) 113 S.W. (2) 929.

²³² De Sloovere, Judge and Jury in Statutory Interpretation (1933) 46 Harv. L.Rev. 1086, 1094.

whether it be judge or jury. And whether the court or the jury is to apply the statute depends upon the usual rules for submission of cases on the evidence—whether reasonable men might differ on the evidence. If they would differ, then the application is for the jury; if not, the application is for the court. In this connection, de Sloovere points out²³³ that application is the process of determining whether the facts of the case come within the meaning found by interpretation. Consequently, even though a statute may be plain and explicit and susceptible to only one sensible meaning, and even though in some cases the problem of application is solved when a single meaning is ascertained as a matter of interpretation, it is often doubtful whether the facts of a given case are within the scope of the statute. Hence, the meaning of a statute is not necessarily doubtful simply because its application is doubtful. Summarizing, this eminent authority says:

“Thus the court (1) determines whether a word or phrase has some legal meaning attached to it which requires legal interpretation, and if so, what it is; (2) assuming such word or phrase does not take a technical legal meaning but has more than one possible meaning, determines whether the right one depends on some other part of the statute, and, if so, what it is; (3) assuming that neither of the prior situations arises but the word or phrase takes a factual meaning independent of the rest of the statute, determines in its discretion whether, being a jury case on the evidence, the penumbra of meaning should be retained by the court or left to the jury as involving other inferences of fact; and (4) if it is not a case for the jury on the evidence, fully interprets and applies the statute itself.”²³⁴

From the foregoing, it would seem clear, strictly speaking, that the jury does not interpret the statute, unless it does so incidentally when its application is left to the jury. And even then, if the meaning of any word or phrase is left to the jury to determine in their application of the statute, their finding should be at best only advisory upon the court.²³⁵ As a result, the jury should be allowed to ascertain the meaning of a word only when the court is sat-

²³³ *Ibid.*, l.c. 1095.

²³⁴ De Sloovere, *Judge and Jury in Statutory Interpretation* (1933) 46 *Harv. L.Rev.* 1086, 1101.

²³⁵ See Thayer, *Preliminary Treatise on Evidence* (1898) Ch. V, p. 215.

isfied it can do so better than the court could.²³⁶ At least, this would seem the proper sphere of the jury in those instances where the word or phrase takes on a factual meaning independent of the statute, for it may often be impossible from a practical standpoint to separate the factual meaning from the facts introduced into evidence to bring the case without or within the scope of the statute involved.²³⁷ Such a situation is represented in the case involving a statute which prohibited sellers of liquors from "allowing any minor to loiter on the premises where such liquors" were kept for sale, and the question was left for the jury to determine whether the front room where groceries were kept for sale and which was separated by a partial partition from the back room where liquors were sold, constituted "on the premises".²³⁸ And still, would it not have been just as well for the court to determine the meaning of the word "premises" and to instruct the jury as to such meaning and leave to them the simple question of ascertaining whether the front room was on the premises as defined by the court?²³⁹ An affirmative answer to this question indicates that the jury's definition, where the meaning is left to them, at best should be only advisory on the court.

§ 183. Evidence of the Meaning of Words and Phrases—To Whom Addressed.—Of course, where the meaning of a word is in doubt, evidence of some sort must be presented in favor of the asserted meaning. The question then arises; to whom shall such evidence be addressed—the court or the jury? The answer to this inquiry will depend upon which one has the duty assigned to it of

²³⁶ This would seem particularly true where the local meaning of a non-legal term was involved. See *Katzman v Common.*, 140 Ky. 124, 130 S.W. 990. That the meaning of words used in a statute is a matter of fact, see *Common. v Pommer*, 330 Pa. 421, 199 Atl. 485.

²³⁷ See *Common. v Wright*, 137 Mass. 250; *Katzman v Common.*, 140 Ky. 124, 130 S.W. 990, and *Tolland v Willington*, 26 Conn. 578. And note *Woodward v London & N.W. Ry. Co. (Eng.)* 3 Ex.D. 121: "I think my Brother Cleasby rightly treated the question, whether the lost articles fell within the description of 'paintings' in the Carriers Act, as one of fact for the jury to determine."

²³⁸ *State v Kinkead*, 57 Conn. 173, 17 Atl. 855. But see *Savannah, etc., R. Co. v Daniels*, 90 Ga. 608, 17 S.E. 647, and *Swanzy v Somerset*, 132 Mass. 312.

²³⁹ See *State v Stevens*, 69 Vt. 411, 38 Atl. 80, where this kind of procedure was followed in handling a technical term.

ascertaining the meaning of the word or term involved. So far as words of common usage are concerned—that is, non-technical words or words of a special meaning—since these are for the court, in order for the court to properly instruct the jury, resort to dictionaries, testimony of witnesses, or any other source of information deemed reliable, would undoubtedly be proper. On the other hand, should a statute contain a word whose meaning, or perhaps whose scope, depended on the facts in the case, evidence of such scope would be for the jury's consideration. With technical words and words of trade or business, the judge may undoubtedly consult documents or books on the subject, as well as refer to persons who have knowledge of such subjects,²⁴⁰ and after ascertaining their meaning, instruct the jury accordingly.²⁴¹ Some cases, however, where the evidence as to the meaning of such words is in conflict, regard the determination of the meaning as a question for the jury. This is perhaps proper where the case is submitted to the jury as a practical proposition.²⁴² Again, *de Sloovere* sheds considerable light on the matter:

“All information necessary for the court to interpret a statute or define its terms, not being evidence in any sense, is for the court in its discretion. If, however, a case is one for the jury, the court should in the exercise of such discretion either determine the meaning and define it for the jury or leave to the jury the question of the content and extent of meaning of popular, trade or commercial terms or phrases, subjecting in the latter case such information by books or witnesses, it is submitted, to all ordinary rules of evidence, because the reasons for rules of exclusion are again present.”²⁴³

§ 184. Effect of Construction or Interpretation on the Law.—
Stare Decisis. The construction placed upon a statute by the courts

²⁴⁰ *Gardner v The Collector (U.S.)* 6 Wall. 499; *State v Stevens*, 69 Vt. 411, 38 Atl. 80. Also see *Carter v Carbonic Pac. Corp.*, 97 Fed. (2) 1, involving term “carbonated beverage.”

²⁴¹ *Ibid.*

²⁴² See note 156, *supra*.

²⁴³ *De Sloovere*, *Judge and Jury in Statutory Interpretation* (1933) 46 Harv. L.Rev. 1086, 1103. Also note *Hurt v Cooper (Tex.)* 113 S.W. (2) 929.

becomes a part of the statute,²⁴⁴ and hence a part of the law thereby enacted. If the legislature, after ample opportunity to change a construction by the enactment of an amendment, fails to do so, it gives its approval of the construction placed on the enactment by the courts.²⁴⁵

Whether the courts will reconsider in a later case, a judicial construction which has been followed by them for a long period of time, is a matter upon which the authorities disagree.²⁴⁶ Only

²⁴⁴ *Lane v Watson*, 51 N.J.L. 186, 17 Atl. 117. And especially after years of consistent construction. *Cunningham v Cunningham*, 120 Tex. 491, 40 S.W. (2) 46, 75 A.L.R. 1305. See also *McKeen v Delancy*, 5 Cranch (U.S.) 22, 3 L.Ed. 25; *Douglas v County of Pike*, 101 U.S. 677, 25 L.Ed. 968; *Blaine v Curtis*, 59 Vt. 120, 7 Atl. 708; *Eau Claire Nat. Bank v Benson*, 106 Wis. 624, 82 N.W. 604.

²⁴⁵ *Manley v Mayer*, 68 Kan. 377, 75 Pac. 550; *State v Missouri Athletic Club*, 261 Mo. 576, 170 S.W. 904; *McCain v State Electrical Board*, 144 Okla. 85, 289 Pac. 759.

²⁴⁶ *Hanau v Ehrlich*, House of Lords (Eng.) (1912) A.C. 39. See *People v Thompson*, 186 N.Y. 413, 79 N.E. 326, 12 L.R.A. (n.s.) 1081, for the following argument in support of adhering to precedent: "We are also impressed with the weight of the argument that in view of the constantly expanding ingenuity of intelligent criminals, which serves to render the administration of criminal justice more and more difficult, the law must be progressively practical in order to keep pace with the development of new forms of crime. But these arguments, impressive as they are, simply serve to suggest that it is the province of the courts to give effect to existing law and not to legislate . . . We cannot change the existing rule without enacting, in effect, an ex post facto law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power." For a reply, in effect, see *Hamilton v Baker* (Eng.) L.R. 14 App. Cas. 209, 221: "I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time." In connection with above cases, also see *McKeen v Delancy*, 5 Cranch (U.S.) 22, 3 L.Ed. 25, *Douglass v County of Pike*, 101 U.S. 677, 25 L.Ed. 968; *Blaine v Curtis*, 59 Vt. 120, 7 Atl. 708; *Eau Claire Nat. Bank v Benson*, 106 Wis. 624, 82 N.W. 604. For effect of only one decision, see *Pearson v Pearson*, 27 Ch.D. 145; also *Pugh v Golden*, 15 Ch.D. 330.

when the reversal of the construction will operate without serious injury, should the courts overrule a former construction which has been relied upon by individuals for a long period of time, even though the original construction is now considered clearly erroneous,²⁴⁷ unless the new construction is denied retroactive effect.²⁴⁸ In this latter event, it would seem proper to overrule the erroneous construction.²⁴⁹

A problem probably more difficult arises in criminal cases. What is the effect of the court's action, in overruling a decision construing a criminal statute, upon a violation thereof accruing before the court overrules the prior decision? In a constitutional sense, there is no vested right in reliance on the decisions of a court as precedent, and one who is brought into court for a violation of law

²⁴⁷ Van Loon v Lyon, 4 Daly (N.Y.) 149, Succession of Lauve, 6 La. Ann. 529: "We believe this to be the true rule, and that a decision of a court is not in fact a law, and if erroneously made, cannot make a law. It is simply the declaration of a court as to what the law is in the opinion of the judges. In the nature of things, judges are sometimes in error, and when that error is discovered, either by the same judges or their successors, it becomes a question as to whether or not, under all the circumstances, the rule of *stare decisis* shall be applied to that case. If the court stands by the decision, the error is perpetuated, as being a less evil to the public than to restore the law in its correctness. If the erroneous decision is overruled, it is then as if it had never been made, and the law is considered as declared in the later opinion." Storrie v Cortez, 90 Tex. 283, 38 S.W. 154, 35 L.R.A. 666. As to whether the courts make law, see Thayer, Judicial Legislation, 5 Harv. L.Rev. 172 (1891).

²⁴⁸ Farriar v New England Mortgage Co., 92 Ala. 176, 9 So. 532, 12 L.R.A. 856. Also see Pierce v Pierce, 46 Ind. 86; State v Longeno, 109 Miss. 125, 67 So. 902 (criminal case) that subsequent decisions cannot impair rights acquired under a statute as construed by former decisions. *Contra*: Allen v Allen, 95 Calif. 184, 30 Pac. 213, 16 L.R.A. 646, and note. See also 29 Harv. L.Rev. 80 (1915). For reliance on prior interpretation as a requirement for protection, see 41 Harv. L.Rev. 678 (1927). If there has been no reliance on the old law, there is little or no reason for following the old rule where it is erroneous. The difficulty, in most instances, is proving reliance or non-reliance.

²⁴⁹ But note, Storrie v Cortez, 90 Tex. 283, 38 S.W. 154, 35 L.R.A. 666, that the policy of conferring on the court the power to limit its decisions to the future is a question for the people, and we cannot, under any notion of injustice, overstep the constitutional limitation to our power, no matter howsoever desirable the departure might be. Accord: Crigler v Shepler, 79 Kan. 834, 101 Pac. 619; Stockton v Dundee Mfg. Co., 22 N.J. Eq. 56. Also see Employer's Liability Cases, 207 U.S. 463, 28 S.Ct. 141, 52 L.Ed. 297.

cannot sustain himself on the mere plea that in some other case which he thought to be analogous, the court rendered a decision which, if applied as he thought it would be, would result in exculpating him from wrong.²⁵⁰ Nevertheless, a distinction may properly be made between an act *malum prohibitum* and one *malum in se*. In the former case, reliance on the old decision ought undoubtedly be allowed as a defence; at least, so far as any criminal intent is concerned.²⁵¹

As will be pointed out later on, the legislature may enact many statutes which will operate retroactively and such operation will be sustained by the courts.²⁵² This is particularly true with reference to those legislative acts relating to procedure, and those of a remedial nature. If retroactive effect is proper in these instances, it is difficult to refuse to allow the court to overturn judicial decisions which place a construction of an erroneous nature upon such statutes, and especially where the new decision has no retroactive effect. Of course, as already suggested, the court should make sure that its former holding is clearly wrong. Once being satisfied that the old decision is erroneous, if the correction of the erroneous construction will promote right and justice in the case under consideration, the court should have little hesitation in reversing its former stand, particularly if no harmful widespread results will follow such action. Any other view places a premium upon error, and perpetuates injustice.

Of course, the chief objection to the reversal of former decisions will be found in the assumption that people enter into various legal relationships and take numerous steps in reliance upon the existing construction of the statute applicable to the situation at hand. To a limited extent that is probably true; but in the vast majority of

²⁵⁰ "It is not the function of a court to lay down the law for future cases but to announce the law for the case which it is deciding. It is an important function of an Appellate Court to so announce its reasons for decision that they may be understood and applied with reference to subsequent cases which are likely to arise, but no court can attempt to anticipate by announcement what the law will be found to be in a case in some respects dissimilar which may subsequently arise. Therefore, as has often been said, "there is no vested right in the decisions of a court . . ." *State v O'Neil*, 147 Iowa 513, 126 N.W. 454.

²⁵¹ *State v O'Neil*, 147 Iowa 513, 126 N.W. 454. See also note in 28 Col. L.Rev. 963 (1928).

²⁵² See § 277, et seq.

cases, people act and enter into the numerous legal relationships utterly ignorant of the court's interpretation of the law. And in those instances where the action is taken in reliance upon the existing interpretation, the party consults legal counsel; otherwise, it would probably be impossible for him to have any idea of the existing interpretation. Where he does this, in most cases, the decision itself will probably reveal the possible error upon which it is founded. If not, the attorney consulted will in all probability realize that the decision stands upon a weak foundation and will advise his client accordingly.

Men enter legal relationships in reliance upon existing statutory law in full knowledge of the fact that the legislature may amend or completely abrogate the law relating to the legal relationship in question. Should they not have the same knowledge, either actually or presumptively, that the courts have the right and the power to correct an erroneous construction of this same statutory law? So long as vested rights are not impaired or destroyed,²⁵³ or criminal or penal statutes involved,²⁵⁴ the courts should have the same latitude as that allowed the legislature in the enactment of legislation, in the correction of erroneous constructions.

The objection to overruling a prior decision has considerably more in its favor, if it can be shown that the legislature has impliedly ratified the court's construction. By a kind of silent legislation, the lawmakers may have approved the erroneous construction, and thereby made it a part of the legislative intent and hence the law of the statute in question. If the construction appears to be erroneous on its face, or by reasonable effort can be ascertained to be so, particularly where the construction is harsh, inequitable, or ridiculous in its operation, it should require strong indication of implied legislative approval before such approval ought to be recognized. Mere acquiescence would probably not be a sufficient indication of approval. Nevertheless, if such an approval clearly appears, the reversal of a former decision would in all probability invade the province of the legislature.

The difficult problems created by the rule *stare decisis* will largely vanish should we forget those theories of construction which tend to thrust the judiciary into a straitjacket and forbid any

²⁵³ See § 278, *infra*.

²⁵⁴ See § 281, *infra*.

consideration of ethical questions. Very rarely will the facts of one controversy be identical or even closely similar with those of a prior controversy upon which the court has passed. True, "the theory of our legal system is that the court finds the law in statute or in adjudicated cases and applies it hard and fast to the facts of the case in hand. Many courts carry out this theory conscientiously in practice. But to a large and apparently growing extent the practice of our application of the law is, after all, that jurors or courts, as the case may be, take the rules of law as a general guide, determine what the equities of the case demand, and contrive to find a verdict or render a judgment accordingly, wrenching the law no more than is necessary. Many courts today are suspected of ascertaining what the equities of a controversy require, and then raking up adjudicated cases to justify the result desired. Occasionally, we find a judge avowing frankly that he looks chiefly at the ethical situation *inter partes* and does not allow the law to interfere therewith beyond what is inevitable."²⁵⁵ And why not? Statutes, at best, can do little more than to lay down a general rule or guide. Specific cases must be largely determined by the equities of the situation, in accord so far as possible with the more specific intent of the statute applicable, and if that leads to an inequitable result, then in accord with the wide, basic, and underlying legislative intention in all of the enactments of the legislature, that the law is intended to promote justice.

It may be urged that this too would make it impossible to know with certainty in advance as to the law on any given state of facts. Undoubtedly, the court's action would be as predictable as under any other method. If we will remember that we all have certain common conceptions of proper ethical conduct, and that the court will consider such conceptions or standards in deciding the prospective or pending controversy, the ultimate decisions would seem reasonably predictable.

²⁵⁵ Pound, *Enforcement of Law*, 20 *Green Bag*, 401. "If a statute be susceptible of two constructions—one consistent with natural equity and justice and one inconsistent therewith, the court should give it that construction which comports with natural equity and justice." *Lombard v Trustees*, 73 *Ga.* 322, 324. Also see *Plumstead v Spackman* (*Eng.*) 13 *Q.B.D.* 878, 886-7: "... but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind he has against such an interpretation of an act of parliament."

Blind reliance upon precedent, regardless of the nature of the decision, will too often operate to continue error, and tend to develop a legal system which exists for its own sake rather than for the use and benefit of its intended beneficiaries. More concern for reason and ethical considerations will operate to provide a beneficial and satisfactory system.

CHAPTER XIX

LINGUISTIC AND GRAMMATICAL CONSTRUCTION

- § 185. In General.
- § 186. Words and Phrases, Generally.
- § 187. Words Having a Technical or Special Meaning.
- § 188. Disjunctive and Conjunctive Words.
- § 189. General and Special Words or Terms.
- § 190. *Noscitur a Sociis* (Associated Words).
- § 191. *Ejusdem Generis*.
- § 192. *Ejusdem Generis* Criticized.
- § 193. Relative and Qualifying Terms.
- § 194. *Reddendo Singula Singulis*.
- § 195. Express Mention and Implied Exclusion (*Expressio Unius est Exclusio Alterius*).
- § 196. Grammar—In General.
- § 197. Inaccurate, Inapt and Awkward Language.
- § 198. Statutes Without Meaning—Indefinite Terms.
- § 199. Punctuation.
- § 200. Alteration, Interpolation and Elimination of Words and Phrases.
- § 201. Correction of Mistakes, Errors, Omissions and Misprints.
- § 202. Foreign Languages.

§ 185. **In General.**—As we have hitherto stated, the intention of the legislature is to be primarily ascertained from the language used in the statute,¹ and if the language is plain and unambiguous, it must be given a literal meaning.² It is subject to construction only when its meaning is not clear.³ Although there are other causes of ambiguity, it will often be due to the use of words and phrases of doubtful meaning, to the arrangement of words, phrases, clauses and sentences in the statute, and even to the punctuation.

§ 186. **Words and Phrases, Generally.**—The purpose and subject matter of a statute necessarily determine or control the mean-

¹ See § 159, *supra*.

² See § 159, *supra*.

³ See § 159, *supra*. But see § 174, *supra*, for treatment of the interpretation of unambiguous statutes.

ing of the words used in it.⁴ For example, the word "the" in the phrase "the proximate cause of death", after due consideration of the statute's purpose and context, was held not to mean the sole cause.⁵ But words of common usage should be given their usual, ordinary and natural meaning,⁶ or signification,⁷ according to approved usage,⁸ unless there is some indication to the contrary in

⁴ *Welch v Comm. Internal Revenue*, 63 Fed. (2) 976; *Craig v Boyes* (Calif. Ap.) 11 Pac. (2) 673; *Brown v Board of Appeals*, 327 Ill. 644, 159 N.E. 225, 56 A.L.R. 242; *Gilbert v Greene*, 185 Ky. 817, 216 S.W. 105; *Common. v Dee*, 222 Mass. 184, 110 N.E. 287; *Swann v Buck*, 40 Miss. 268; *Swartout v Railroad Co.*, 24 Mich. 389; *State v Hays*, 86 Mont. 58, 282 Pac. 32; *Davis v W. T. Grant Co. (N.H.)* 185 Atl. 889; *Wiley v Solvay Process Co.*, 215 N.Y. 584, 109 N.E. 606; *State v Siegmund*, 125 Ore. 197, 266 Pac. 1075; *State v Leuch*, 155 Wis. 500, 144 N.W. 1122; *State ex rel Goshen Irr. Dist. v Hunt (Wyo.)* 57 Pac. (2) 793.

⁵ *Craig v Boyes* (Calif. Ap.) 11 Pac. (2) 673. Similarly, "writing" did not include a letter, as the former was used in the statute prohibiting the mailing of obscene writing. *United States v Chase*, 135 U.S. 255, 10 S.Ct. 756, 34 L.Ed. 117; "entailment" was meant to include estates tail by deed as well as by will. *Den v Dubois*, 16 N.J.L. 285.

⁶ *Miller v Robertson*, 266 U.S. 243, 45 S.Ct. 73, 69 L.Ed. 265; *Allen v Morsman*, 46 Fed. (2) 891; *Arizona Eastern R. Co. v Matthews*, 20 Ariz. 282, 180 Pac. 159, 7 A.L.R. 1149; *Mays v Robertson*, 172 Ark. 279, 288 S.W. 382; *Corbett v State Board*, 188 Calif. 289, 204 Pac. 823; *Darius v Apostolos*, 68 Colo. 323, 190 Pac. 510, 10 A.L.R. 986; *Rash v Allen*, 24 Dela. 444, 76 Atl. 370; *Cook v Massey*, 38 Ida. 264, 220 Pac. 1088, 35 A.L.R. 200; *Walgreen v Industrial Comm.*, 323 Ill. 194, 153 N.E. 831, 48 A.L.R. 1199; *Smith v State (Ind.)* 172 N.E. 911; *First Nat. Bank v Burke*, 201 Iowa 994, 216 N.W. 287; *Gold Trading Stamp Co. v Common.*, 224 Ky. 136, 5 S.W. (2) 910; *Brown v Robinson (Mass.)* 175 N.E. 269; *People v Smith*, 246 Mich. 393, 224 N.W. 402; *Bellerive Inv. Co. v Kansas City*, 321 Mo. 969, 13 S.W. (2) 628; *State v Byrum*, 60 Neb. 384; *Ex parte Ming*, 42 Nev. 472, 181 Pac. 319, 6 A.L.R. 1216; *People v Shakun*, 251 N.Y. 107, 167 N.E. 187, 64 A.L.R. 1066; *Manning v A. & Y. R. Co.*, 188 N.C. 648, 125 S.E. 555; *West v Lysle*, 302 Pa. 147, 153 Atl. 131; *Common. v Bailey*, 124 Va. 800, 97 S.E. 774; *State v Hemrich*, 93 Wash. 439, 161 Pac. 79; *State v Surber*, 83 W.Va. 785, 99 S.E. 187; *State v Phelps*, 171 Wis. 13, 176 N.W. 217. In this connection also see the interesting case of *Nix v Hedden*, 149 U.S. 304, 13 S.Ct. 881, 37 L.Ed. 745, where a tomato was held to be a vegetable and not a fruit, since the latter was not its ordinary meaning.

⁷ *U.S. v Brunett*, 53 Fed. (2) 219; *Hackensack Trust Co. v City*, 116 N.J.L. 343, 184 Atl. 408; *Eastman v State*, 131 Ohio St. 1, 1 N.E. (2) 140.

⁸ *Wadsworth v Boysen*, 148 Fed. 771, 78 C.C.A. 437; *Schaffer v Burnett*, 120 Ill. Ap. 70; *Huber v Robinson*, 23 Ind. 137; *Gallagher v Wheeler (Mass.)* 198 N.E. 891. Or everyday meaning. *Holliday v McFadden (S.C.)* 198 S.E. 392.

the statute itself.⁹ The sense in which the words in question are used in every day life rather than their scientific meaning is the criterion to use in ascertaining their meaning.¹⁰ And it is to be presumed that the legislature has used the words in their known and ordinary signification.¹¹ On the other hand, technical terms should be given their technical meanings.¹² The meaning of any word, however, will always depend upon the legislative intent, and the meaning intended by the legislature should prevail, even though it be contrary to common usage¹³ or to technical significance.¹⁴ Accordingly, words should be given their natural signifi-

⁹ *Deganay v Lederer*, 250 U.S. 376, 39 S.Ct. 524, 63 L.Ed. 1042; *Spano v Western Fruit Growers*, 83 Fed. (2) 150; *State ex rel Atty. Gen. v Anderson-Tully Co.*, 186 Ark. 170, 53 S.W. (2) 17, 85 A.L.R. 100; *Ex parte Alpine*, 203 Calif. 731, 265 Pac. 947, 58 A.L.R. 1500; *Bistline v Vassett*, 47 Ida. 66, 272 Pac. 696, 62 A.L.R. 323; *Flood v City Nat. Bank*, 218 Iowa 898, 253 N.E. 509, 95 A.L.R. 1168; *Sayles v Comm. of Corps.*, 286 Mass. 102, 189 N.E. 579, 91 A.L.R. 1267; *People v Labbe*, 202 Mich. 513, 168 N.W. 451; *People v Shakun*, 251 N.Y. 107, 167 N.E. 187; *Smith v Buck*, 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343; *Hall v Baylous*, 109 W.Va. 1, 153 S.E. 293, 69 A.L.R. 527. Thus, the word "writing" in a criminal statute prohibiting the mailing of obscene, lewd and lascivious writing, did not include a letter, by virtue of the reasoning that when "in ordinary intercourse men speak of mailing a "letter" or receiving by mail a "letter," they do not say mail a "writing" or receive by mail a "writing" . . . In the statute under consideration, the word "writing" is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated." *United States v Chase*, 135 U.S. 255, 10 S.Ct. 756, 34 L.Ed. 117. Also see *Franklin, etc., R. Co. v Shoemakers Committee*, 156 Va. 619, 159 S.E. 100, where a gasoline motor car operated on a railroad track is not a "locomotive engine;" *People v Shakun*, 251 N.Y. 107, 167 N.E. 187, where a printing press was held not to fall within the scope of a statute forbidding the acceptance of "tools or implements of trade" as security for a usurious loan.

¹⁰ *In re Great Western Petro. Corp.*, 16 Fed. Supp. 247.

¹¹ *Old Colony R. Co. v Comm. Internal Revenue*, 284 U.S. 552, 52 S.Ct. 211, 76 L.Ed. 484. Might not this be due to the fact that the legislature is composed, as a general rule of laymen, or of a majority of laymen, and because the legislature in enacting the usual run of legislation is passing laws for the people at large?

¹² See § 187, *infra*.

¹³ *In re Segregation of School Dist. No. 46*, 34 Idaho 231, 200 Pac. 140; *Baker & Conrad v Chicago Constr. Co.*, 364 Ill. 386, 4 N.E. (2) 953.

¹⁴ See § 187, note 27, *infra*.

cance, unless it will lead to results plainly at a variance with the evident purpose of the legislature.¹⁵ And in this connection, the court should always bear in mind that the meaning of words may be enlarged or entirely changed within a few decades.¹⁶ Moreover, while ordinary words should be given their natural and ordinary meaning, they may be enlarged in order to effectuate the obvious purpose of the statute.¹⁷ And the court may consider the fact that the legislators are not necessarily trained philologists.¹⁸ Similarly, where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted,¹⁹ even though the ordinary meaning of the word is thereby enlarged or restricted, and especially in order to avoid absurdity or to prevent injustice.²⁰ Thus, the word "any" has been regarded as equiv-

¹⁵ *City of Lincoln v Ricketts*, 56 S.Ct. 507, rev. 77 Fed. (2) 425, cert. gr. 296 U.S. 566, 56 S.Ct. 136, 80 L.Ed. 400. The practicing of law "as an attorney," held to include the drawing of legal instruments as a business. *People v Alfani*, 227 N.Y. 334, 125 N.E. 671. And since the legislative intent is always suggested by the effect of a suggested construction, see § 177, *supra*, similarly, "the effects and consequence, do very often point out the genuine meaning of words. If by taking them literally, they bear none, or a very absurd signification, to avoid such an inconvenience, we must a little deviate from the received sense of them." Puffendorf's Rules, as given by Dwarris (Potter) on Stat., p. 132.

¹⁶ *In re Great Western Petro. Corp.*, 16 Fed. Supp. 247. "The true rule is that statutes are to be construed as they were intended to be understood when they were passed . . . The words of a statute must be taken in the sense in which they were understood at the time the statute was enacted." *People v Barnett*, 319 Ill. 403, 150 N.E. 290, 292.

¹⁷ *Passaic National Bank v Eelman*, 116 N.J.L. 279, 183 Atl. 677; *Humiston v Universal Film Mfg. Co.*, 178 N.Y.S. 572, 189 Ap. Div. 467.

¹⁸ *Lynett v Huester*, 322 Pa. 524, 185 Atl. 835.

¹⁹ *U.S. v United Verde Copper Co.*, 196 U.S. 207, 25 S.Ct. 222, 49 L.Ed. 449; *People v Ballhorn*, 100 Ill. Ap. 571; *State v Louisiana, etc., R. Co.*, 215 Mo. 479, 114 S.W. 956; *Hough v Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; *Smith v St. Paul, etc., R. Co.*, 39 Wash. 355, 81 Pac. 840. The word "spirits" will not include spirits of nitre. *Attorney Gen. v Bailey (Eng.)* 1 Ex. 281.

²⁰ *U.S. v Hogg*, 112 Fed. 909; *Carrigan v Stillwell*, 99 Me. 434, 59 Atl. 683, 68 L.R.A. 386; *Nephi Plaster Co. v Juab County*, 33 Utah 114, 93 Pac. 53; *State v Board of Canvassers*, 159 Wis. 216, 150 N.W. 542. But if the meaning is plain, consequent injustice cannot be considered. *U.S. v Colorado & N.W. R. Co.*, 157 Fed. 321; *Cearfoss v State*, 42 Md. 403; *People v Long Island R. Co.*, 194 N.Y. 130, 87 N.E. 79.

alent to and having the force of "every" or "all".²¹ Nevertheless, a statute should not be interpreted to embrace that which is not within the words used simply because no reason can be found why it was not included.²² It is sufficient if full effect is given to every word.²³

§ 187. Words Having a Technical or Special Meaning.—Technical terms in a statute, as we have suggested above, must be accorded their technical meaning,²⁴ unless the statute indicates that the legislature intended otherwise.²⁵ Moreover, there is a presump-

²¹ *Roedler v Vandalia Bus Lines*, 281 Ill. Ap. 520. Similarly, the term "beyond the seas" has been held to mean "out of the state," *Bank of Alexandria v Dyer (U.S.)* 14 Pet. 141, 10 L.Ed. 391; a statute which prohibited the exhibition of immoral pictures did not include theaters, *Block v Chicago*, 239 Ill. 251, 87 N.E. 1011; and the term "wagon" in an exemption statute was held not to exempt a coach used for the conveyance of passengers. *Quigley v Forham*, 5 Calif. 418.

²² *Denn v Reid (U.S.)* 10 Pet. 524.

²³ *Washington Market Co. v Hoffman*, 101 U.S. 112, 25 L.Ed. 782; *James v Dubois*, 16 N.J.L. 285.

²⁴ *Douglas v Edwards*, 298 Fed. 229; *Ex parte Smith*, 88 Calif. Ap. 464, 263 Pac. 555; *Katzman v Common.*, 140 Ky. 124, 130 S.W. 990; *Green v Weller*, 32 Miss. 650; *State v Murlin*, 137 Mo. 297, 38 S.W. 923; *In re Lewis' Estate*, 39 Nev. 445, 159 Pac. 961; *Sargent v Union School Dist.*, 63 N.H. 528, 2 Atl. 641; *People ex rel. Hunt v Lane*, 116 N.Y.S. 990, 132 Ap. Div. 406; *State v Hull*, 170 Wis. 174, 174 N.W. 478. Also see: *Clark v City of Utica (N.Y.)* 18 Barb. 451; *Vann v Edwards*, 135 N.C. 661, 47 S.E. 784, 67 L.R.A. 461. "Issue" and "heirs in fee" may not be regarded as synonymous. *Gardner v Anderson*, 116 Kan. 431, 227 Pac. 743.

²⁵ *U.S. v Stone, etc., Co.*, 274 U.S. 225, 47 S.Ct. 616, 71 L.Ed. 1013; *Westerlund v Black Bear Mining Co.*, 203 Fed. 599, 121 C.C.A. 627; *Fernwood v Pluna*, 138 Ark. 459, 213 S.W. 397; *Ex parte Smith*, 88 Calif. Ap. 464, 263 Pac. 555; *People v Covelesky*, 217 Mich. 90, 185 N.W. 770. "It is a familiar rule of statutory construction that common words are to be extended to all the objects which in their usual acceptation they describe or denote, and that technical terms are to be allowed their technical meaning and effect, unless in either case the context indicates that such construction would frustrate the real intention of the lawmaking power." *Ex parte Smith*, 88 Calif. 464, 263 Pac. 555, 557. Consequently, the word "sheathing" was held to refer to a covering of any material, even in its technical sense, so as to include the shingles on a wooden roof.

tion that they have been used in their technical sense.²⁶ Nevertheless, where it appears that a contrary meaning was intended by the legislature, the common, or non-technical meaning, should be applied, or the technical meaning enlarged or restricted so as to effectuate the obvious purpose of the legislature.²⁷ This rule is applicable to technical legal terms,²⁸ words having a special sense

²⁶ *Clinton Mining Co. v Beacom*, 266 Fed. 621, 39 A.L.R. 490; *Flood v City National Bank*, 218 Iowa 898, 253 N.E. 509, 95 A.L.R. 1168; *Smith v Buck*, 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343; *Clark v City of Utica (N.Y.)* 18 Barb. 451; *Vann v Edwards*, 135 N.C. 661, 47 S.E. 784, 67 L.R.A. 461. Are not the laws containing technical terms enacted to govern men who are, or should be familiar with the technical meaning of such terms? This would seem to justify the presumption.

²⁷ *Passaic National Bank v Eelman*, 116 N.J.L. 279, 183 Atl. 677; *Cooney v Lincoln*, 20 R.I. 183, 37 Atl. 1031. Also see *Ex Parte Vincent*, 26 Ala. 145.

²⁸ *Thorne v Browne*, 257 Fed. 519, 168 C.C.A. 469; *Fernwood Mining Co. v Pluna*, 138 Ark. 459, 213 S.W. 397; *Stullken v Sims*, 199 Ill. Ap. 102; *State v Freiburg*, 70 Ind. Ap. 1, 122 N.E. 771; *Sears v City of Maquoketa*, 183 Iowa 1104, 166 N.W. 700; *President of Merchants Bank v Cook (Mass.)* 4 Pick. 405; *Sargent v Union School Dist.*, 63 N.H. 528, 2 Atl. 641; *Loewy v Gordon*, 114 N.Y.S. 211, 129 Ap. Div. 459; *Asbury v Town of Albemarle*, 162 N.C. 247, 78 S.E. 146; *In re Leets Estate*, 104 Ore. 32, 202 Pac. 414, 206 Pac. 548; *O'Toole v Duluth Ry. Co.*, 153 Wis. 461. "Steal" means simple larceny. *Alexander v State*, 12 Tex. 540. "Murder" includes malice aforethought. *State v Phelps*, 24 La. Ann. 493. But see *Emmert v Hayes*, 89 Ill. 11, where the popular meaning was given to the words "separate estate". Also note *Robinson v Varnell*, 16 Tex. 382, where the phrase "actions of debt" was construed to include an action for damages, on the ground that, since actions for debt had been abolished, the technical meaning would result in an absurdity; hence, the popular meaning was accepted. And see *Moore v Social Security Comm. (Mo.)* 122 S.W. (2) 391, that the word "needy" in the federal statute authorizing appropriations for the purpose of enabling states to furnish financial assistance to "needy" persons, must be given its ordinary legal meaning of "indigent, necessitous, very poor," so that an aged man having no property or right in property of any value is "needy", even though he has a child who can support him. The word "issue", in its legal sense as used in a statute, means descendants, lineal descendants or offspring. *Wright v Tuscaloosa (Ala.)* 182 So. 72. Prima facie the word "children" means legitimate children. *In re Dragoni (Wyo.)* 79 Pac. (2) 465.

at common law,²⁹ military terms,³⁰ and words of arts.³¹ And terms borrowed from a foreign law should be given the meaning they have in the foreign law.³² Similarly, where the words incorporated in a statute have acquired a specific meaning by virtue of judicial interpretation, such meaning should be accepted, in the absence of some indication of a contrary legislative intention.³³ And the same is true with reference to commercial or trade names used in a tariff act to designate certain kinds of goods, where such names have acquired a well known meaning in trade and commerce.³⁴ But where a word has both a technical and a popular meaning—no matter in what sort of a statute it appears—the latter meaning will

²⁹ *Henry v U.S.*, 251 U.S. 393, 40 S.Ct. 185, 64 L.Ed. 322; *Ex parte Vincent*, 26 Ala. 145; *Fort v Brinkley*, 87 Ark. 400, 112 S.W. 1084; *Western Union Tel. Co. v Scircle*, 103 Ind. 227, 2 N.E. 604; *People v Covelesky*, 217 Mich. 90, 185 N.W. 770; *Mayo v Wilson*, 1 N.H. 53; *In re Lewis*, 39 Nev. 445, 159 Pac. 961, 4 A.L.R. 241; *Smith v Buck*, 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343.

³⁰ *Ex parte Hall (Mass.)* 1 Pick. 261.

³¹ *Hockett v State*, 105 Ind. 250, 5 N.E. 178; *Passaic National Bank v Eelman*, 116 N.J.L. 279, 183 Atl. 677; *Brocket v Ohio, etc., R. Co.*, 14 Pa. St. 241. "Telephone" held word of art. *Hockett v State*, 105 Ind. 250, 5 N.E. 178.

³² *U.S. v Jones*, Fed. Cas. No. 15, 494. Also see 33 Harv. L.Rev. 587 (1920).

³³ *U.S. v Merriam*, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547; *People v Ill. Central R. Co.*, 314 Ill. 373, 145 N.E. 731; *Smith v Board of Educ.*, 264 Ky. 150, 94 S.W. (2) 321; *Cronan v Cotting*, 104 Mass. 245; *Sanders v St. Louis, etc., Anchor Line*, 97 Mo. 26, 10 S.W. 595, 3 L.R.A. 390; *Moskowitz v Marrow*, 251 N.Y. 380, 167 N.E. 506, 66 A.L.R. 870.

³⁴ *Barrow v U.S. (U.S.)* 7 Pet. 404, 8 L.Ed. 728; *Arthur v Morrison*, 96 U.S. 108, 24 L.Ed. 766; *Toplitz v Hedden*, 146 U.S. 252, 13 S.Ct. 70, 36 L.Ed. 961. "Since we are dealing with a tax which is directed at a particular industry, this definite proof of a trade usage as to the term "carbonated beverages" calls into application the familiar rule that commercial and trade terms having a uniform and definite meaning in commerce and trade will be interpreted accordingly . . . If the act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning though it may differ from the common or ordinary meaning of the words." *Carter v Liquid Carbonic Pac. Corp.*, 97 Fed. (2) 1, 3. Accordingly, 3.2 beer did not come within the meaning of the words "carbonated beverage".

prevail over the former, in the absence of any indication that the word was used in its technical sense.³⁵

§ 188. Disjunctive and Conjunctive Words.—In ordinary use the word “or” is a disjunctive that marks an alternative which generally corresponds to the word “either”.³⁶ In face of this meaning, however, the word “or” and the word “and” are often used interchangeably. As a result of this common and careless use of the two words in legislation, there are occasions when the court, through construction, may change one to the other.³⁷ This cannot be done if the statute’s meaning is clear,³⁸ or if the alteration operates to change the meaning of the law.³⁹ It is proper only in order to more accurately express,⁴⁰ or to carry out the obvious intent of the legislature,⁴¹ when the statute itself furnishes cogent proof of

³⁵ *Well v Kenfield*, 54 Calif. Ap. 111; *Southern Bell Tel. Co. v D’Alemberte*, 39 Fla. 25, 21 So. 570; *Maiss v Metropolitan Amusement Co.*, 241 Ill. 177, 89 N.E. 268; *Fedi v Ryan*, 118 N.J.L. 516, 193 Atl. 801; *Weirich v State*, 140 Wis. 98, 121 N.W. 652.

³⁶ *Dodd v Independent Stove & Furnace Co. (Mo.)* 51 S.W. (2) 114. Also see *Ohio Fuel Supply Co. v Paxton*, 1 Fed. (2) 662, *aff’d* 11 Fed. (2) 740; *Tyson v Burton*, 110 Calif. Ap. 428, 294 Pac. 750.

³⁷ *Santos v Dondero (Calif.)* 54 Pac. (2) 764; *LaRose v Posehl*, 282 N.Y.S. 332, 156 Misc. 476 (anti-labor injunction act).

³⁸ *Robinson v Southern Pac. R. Co.*, 105 Calif. 526, 38 Pac. 94, 28 L.R.A. 773; *Beaty v Richardson*, 56 S.C. 173, 34 S.E. 73, 46 L.R.A. 517; *Ashland County Bank v Butternut*, 208 Wis. 90, 241 N.W. 638, 82 A.L.R. 865.

³⁹ *Lyon Lumber Co. v Home Accident Ins. Co.*, 175 La. 476, 143 So. 379.

⁴⁰ *Long v Jerzewski*, 257 N.Y.S. 371, 235 Ap. Div. 441.

⁴¹ *Beasley v Parnell*, 177 Ark. 912, 9 S.W. (2) 10; *Smith v Farley*, 140 N.Y.S. 990, 155 Ap. Div. 813; *Common v Kelley*, 23 Pa. Dist. 766; *Weir v Bauer (Utah)* 286 Pac. 936; *State v Tiffany*, 44 Wash. 602, 87 Pac. 932. For substitution of “and” for “or”, see: *Clark v State*, 155 Ark. 16, 243 S.W. 865; *Thomas v Grand Junction*, 13 Colo. Ap. 80, 56 Pac. 665; *Edwards v State*, 62 Fla. 40, 56 So. 401; *People v Emmerson*, 302 Ill. 300, 134 N.E. 707; *State v Brandt*, 41 Iowa 593; *Moore v Polsgrove*, 219 Ky. 410, 293 S.W. 965; *Central Trust Co. v Howard (Mass.)* 175 N.E. 461; *State ex rel Stinger v Krueger*, 280 Mo. 293, 217 S.W. 310; *People v Rice*, 138 N.Y. 151, 33 N.E. 846; *City of Knoxville v Gerwin (Tenn.)* 89 S.W. (2) 348; *Morse v Tracey*, 91 Vt. 476, 100 Atl. 923; *State v Steiner*, 160 Wis. 175, 151 N.W. 256. And for substitution of “or” for “and”, see: *Northern Commercial Co. v U.S.*, 217 Fed. 33, 133 C.C.A. 143; *People v Trustees of Northwestern College*, 322 Ill. 120, 152 N.E. 555; *State v Myers*, 146 Ind. 36, 44 N.E. 801; *James v U.S. Fidelity & Guar. Co.*, 133 Ky. 299, 177 S.W. 406; *In re Steinruck’s Insolvency*, 225 Pa. 461, 74 Atl. 360; *Robson v Cantwell*, 143 S.C. 104, 141 S.E. 180.

the error of the legislature,⁴² and especially where it will avoid absurd or impossible consequences,⁴³ or operate to harmonize the statute and give effect to all of its provisions.⁴⁴ Accordingly, the word "or", as used in a statute which provided that the owner or operator of a motor vehicle should not be liable to a guest in case of an accident unless the accident was intentional on the part of the owner or operator, or caused by his heedlessness "or" reckless regard of the rights of others, was interpreted to mean "and" since otherwise the statute would have effected no change in existing liability.⁴⁵ The substitution of these two words for each other is also permissible in criminal statutes,⁴⁶ although some authorities hold otherwise.⁴⁷ It is suggested, however, that a substitution should not be made where it would aggravate the offense or increase the punishment.⁴⁸ The court should be extremely reluctant in a criminal statute to substitute disjunctive words for conjunctive words, and vice versa, if such action adversely affects the accused.

⁴² Santos v Dondero (Calif.) 54 Pac. (2) 764.

⁴³ Rice v U.S., 53 Fed. 910; Doughton Seed Co. v U.S. (U.S.) 24 C.C.P.A. 258; Hines v Mills (Ark.) 60 S.W. (2) 181; Robinson v Southern Pac. R. Co., 105 Calif. 526, 38 Pac. 94, 28 L.R.A. 773; Collins v Granite Co., 72 Me. 422. And see People ex rel Fix v Northwestern College, 322 Ill. 120, 152 N.E. 555, where the court refused to substitute "or" for "and" in a statute which exempted from taxation all "property used exclusively for religious purposes, or used exclusively for school and religious purposes," in order to exempt property owned by a non-sectarian school of liberal arts. Also note State ex rel Spillman v Bructon Mfg. Co. (Neb.) 207 N.W. 664, 44 A.L.R. 1172, where "and" was changed to "or" in a statute reading: "If a corporation is ousted and dissolved by the proceeding herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders."

⁴⁴ See note in 48 Am. Dec. 573. And see Kirk v State, 126 Tenn. 7, 150 S.W. 83, that such substitution may be utilized in order to make a law constitutional.

⁴⁵ Fulghum v Bleakley, 177 S.C. 286, 181 S.E. 30.

⁴⁶ Williams v State, 99 Ark. 149, 137 S.W. 927; Ex parte Chin Yan, 60 Calif. 79; City of Indianapolis v Huegele, 115 Ind. 581, 18 N.E. 172; State v Myers, 10 Iowa 448; Williams v Poor, 65 Iowa 410, 21 N.W. 553; Carlsen v State (Neb.) 254 N.W. 744, cert. den. 55 S.Ct. 123; People v Lyttle, 40 N.Y.S. 153, 7 Ap. Div. 553.

⁴⁷ U.S. v Ten Cases of Shawls, 28 Fed. Cas. 16, 448; Buck v Danzenbacker, 37 N.J.L. 359; Fagan v State, 47 N.J.L. 175.

⁴⁸ State v Maurer, 255 Mo. 152, 164 S.W. 551; State v Walters, 97 N.D. 489, 2 S.E. 539.

§ 189. **General and Special Words or Terms.**⁴⁹—It is also a basic rule of construction that general words should be given a general construction;⁵⁰ that is, they should be given their full and natural meaning;⁵¹ unless the statute in some manner reveals that the legislative intent was otherwise.⁵² Such a contrary intent may be found in the purpose and subject matter,⁵³ or context of the statute,⁵⁴ so that as a result the general terms may be qualified or restrained.⁵⁵ For example, a statute which provides for the taxation of all property of a certain kind, means all of such property that is within the jurisdiction of the taxing power.⁵⁶ And where

⁴⁹ Also see § 167, *supra*.

⁵⁰ *Tynan v Walker*, 35 Calif. 634; *Torrance v McDougald*, 12 Ga. 526; *Jones v Jones*, 18 Me. 308; *State ex rel School Dist. v Lee*, 303 Mo. 641, 262 S.W. 344; *State v Overstreet*, 53 Mont. 585, 165 Pac. 753; *Briggs v Cemetery Ass'n*, 185 N.Y.S. 348, 113 Misc. 685; *State v Willis*, 130 Tenn. 403, 170 S.W. 1030; *Skeen v Craig*, 31 Utah 20, 86 Pac. 487; *Van Steenwyck v Washburn*, 59 Wis. 483, 17 N.W. 289. But general words in a statute do not include or bind the government by whose authority the statute was enacted, where its sovereignty, rights, prerogatives, or interests are involved. *State ex rel Martin v Reis (Wis.)* 284 N.W. 580. Since laws are presumed to be for the benefit of the citizen rather than for the benefit of the government, if the government is not expressly referred to in the statute, it is presumed that it was not intended to be affected thereby, unless the presumption is overturned by a clear and irresistible implication from the statute itself. *U.S. v Hewes*, Fed. Cas. No. 15,359. Also see *Title Guaranty Co. v Guarantee Title Co.*, 174 Fed. 385; *U.S. v Herron (U.S.)* 20 Wall. 251, 22 L.Ed. 275 (bankruptcy); *State ex rel Goodman v Halter*, 149 Ind. 292, 47 N.E. 665 (statute of limitations); *Major v Montclair R. Co.*, 35 N.J.L. 328 (eminent domain); *Haley v Sheridan*, 190 N.Y. 331, 83 N.E. 296 (court costs), and *State v Griftner*, 61 Ohio St. 201, 55 N.E. 612 (taxes). But see *Doe v Deavors*, 11 Ga. 79; *Common. v Garrigues*, 28 Pa. 9, and *Martin v State*, 24 Tex. 61.

⁵¹ *Anderson v City of Hattiesburg*, 131 Miss. 216, 94 So. 163. Also see cases under note 50, *ibid*.

⁵² *Tynan v Walker*, 35 Calif. 634; *State v Huxford*, 35 R.I. 387, 87 Atl. 171; *Van Steenwyck v Washburn*, 59 Wis. 483, 17 N.W. 289.

⁵³ *Board of Com'rs v Lunney*, 46 Colo. 403, 104 Pac. 945; *Barber v Morgan*, 89 Conn. 583, 94 Atl. 984; *Myer v Ada County (Idaho)* 293 Pac. 322; *People v Harrison*, 191 Ill. 257, 61 N.E. 99; *State v Fry*, 186 Mo. 198, 85 S.W. 328; *Matter of Holbrook*, 99 N.Y. 539, 2 N.E. 887; *In re Metcalf's Estate*, 41 Wyo. 36, 282 Pac. 27.

⁵⁴ *Torrance v McDougald*, 12 Ga. 526.

⁵⁵ *Lynch v City of Long Branch*, 111 N.J.L. 148, 167 Atl. 664.

⁵⁶ *Common. v Standard Oil Co.*, 101 Pa. 119.

any other construction will lead to unjust,⁵⁷ oppressive,⁵⁸ or absurd⁵⁹ consequences, general words should be given a limited or restricted meaning. In addition to these, general terms may also be restricted by specific words with which they are associated,⁶⁰ with the result that the general language will be limited by the specific language which indicates the statute's object and purpose.⁶¹ For instance, the word "land" will usually include the buildings thereon, but the buildings will be excluded where the word "land" is coupled with the word "building".⁶² Special words, on the other hand, may be expanded in their meaning as well as limited or restricted,⁶³ provided the purpose of the statute is general, if such expansion will make the intent of the legislature effective.⁶⁴ Nevertheless the general rule may be announced that in the construction of statutes, general words are to be considered more broadly than specific words, and specific words more narrowly than general words.⁶⁵

§ 190. Noscitur a Sociis (Associated Words).—In order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning, the court may properly resort

⁵⁷ *Oakland v Oakland Water Front Co.*, 118 *Calif.* 160, 50 *Pac.* 277; *Greek-American Produce Co. v Ill. Cent. R. Co.*, 4 *Ala. Ap.* 377.

⁵⁸ *Chinese Merchant's Case*, 13 *Fed.* 605; *State v Smiley*, 65 *Kan.* 240, 69 *Pac.* 199, 67 *L.R.A.* 903, *aff.* 196 *U.S.* 447, 25 *S.Ct.* 289, 49 *L.Ed.* 546.

⁵⁹ *Tsoi Sim v U.S.*, 116 *Fed.* 920, 54 *C.C.A.* 154; *State ex rel McPherson v St. Louis, etc., R. Co.*, 105 *Mo. Ap.* 207, 79 *S.W.* 714; *People v McDonald*, 3 *N.Y.S. (2)* 784, 167 *Misc.* 1080.

⁶⁰ *Myer v Ada County (Idaho)* 293 *Pac.* 322; *State v Board of Com'rs*, 175 *Ind.* 400, 94 *N.E.* 716; *Darling v Darling*, 194 *N.Y.S.* 897, 118 *Misc.* 817.

⁶¹ *In re Rouse Hazard & Co.*, 91 *Fed.* 96; *U.S. v Crawford*, 6 *Mackey (D.C.)* 319; *Dawson County v Clark*, 58 *Neb.* 756; 79 *N.W.* 822; *Nance v Southern Ry. Co.*, 149 *N.C.* 366, 63 *S.E.* 116.

⁶² *People ex rel International Nav. Co. v Barker*, 153 *N.Y.* 98, 47 *N.E.* 46.

⁶³ *Roberts v Allen (Calif.)* 7 *Pac. (2)* 309.

⁶⁴ *Board of Com'rs v Lunney*, 46 *Colo.* 403, 104 *Pac.* 945; *Lewis v Northern Pac. R. Co.*, 36 *Mont.* 207, 92 *Pac.* 469. Perhaps the most outstanding example of this principle, is the inclusion of grandchildren in the word "child" in statutes of distribution. *Walton v Cotton (U.S.)* 19 *How.* 355, 15 *L.Ed.* 658; *Beebe v Eastabrook*, 79 *N.Y.* 246; *Appeal of Eshleman*, 74 *Pa.* 42.

⁶⁵ *Davis v W. T. Grant Co. (N.H.)* 185 *Atl.* 889. And an expression in a statute of a limited purpose precludes an inference that the legislature intended the statute to have a broader effect. *Bowdler v St. Johnsbury Trucking Co. (N.H.)* 4 *Atl. (2)* 871.

to the other words with which the ambiguous word is associated in the statute.⁶⁶ Accordingly, if several words are connected by a copulative conjunction, a presumption arises that they are of the same class,⁶⁷ unless, of course, a contrary intention is indicated.⁶⁸ On the other hand, the maxim,⁶⁹ "*noscitur a sociis*", is not to be applied where the meaning of a word or phrase is clear and unambiguous.⁷⁰ Nor is it to be used so as to render general words useless.⁷¹ Like all other principles of construction, it is to be used only as an instrumentality for determining the intent of the legislature where it is in doubt.⁷²

§ 191. **Ejusdem Generis.**—Where general words follow the designation of particular things, or classes of persons or subjects,

⁶⁶ Neal v Clark, 95 U.S. 704, 24 L.Ed. 586; Patton v U.S., 159 U.S. 500, 16 S.Ct. 89, 40 L.Ed. 233 (revenue law); Haisten v State, 5 Ala. Ap. 56; O'Neal v Turner (Ala.) 158 So. 801; Sheely v People, 54 Colo. 136, 129 Pac. 201; Carson v Shelton, 128 Ky. 248, 107 S.W. 793; Israel v City of New Orleans, 130 La. 980, 58 So. 580; Stradar v Stern, 172 N.Y.S. 482, 184 Ap. Div. 700; State v Sorlie, 56 N.D. 650, 219 N.W. 105; In re McCully's Estate, 269 Pa. 122, 112 Atl. 159; Clark v City of Burlington, 101 Vt. 391, 143 Atl. 677. This rule, while analogous to that which requires a statute to be construed with reference to the subject matter of the act, is not the same. That rule directs the court to seek the exact meaning of a doubtful word or phrase by a consideration of the tenor of the whole law and the object and purpose in enacting it, but the present rule is rather one of personal criticism, and applies to the case of several terms grouped together and mutually qualifying each other. Black, Int. L., § 67. State v Black, 75 Wis. 490, 44 N.W. 635, is a good example of the application of the rule of *noscitur a sociis*. In this case, involving a criminal statute, the words "money, goods, wares, merchandise, or other property" were held to apply only to tangible property.

⁶⁷ Carson v Shelton, 128 Ky. 248, 107 S.W. 793; Gates v City of Richmond, 103 Va. 702, 49 S.E. 965; Brown v Chicago & N. W. Ry. Co., 102 Wis. 137, 77 N.W. 748, 78 N.W. 771, 44 L.R.A. 579. But the use of the disjunctive probably makes the maxim inapplicable. Russell v Porto Rico, 26 Porto Rico 456.

⁶⁸ State v Russell, 41 Conn. 433. Also see cases under note 67, *ibid*.

⁶⁹ Morecock v Hood, 202 N.C. 321, 162 S.E. 730; Bear v Marx, 63 Tex. 298. That "*noscitur a sociis*" is not a fixed rule of construction, see Corona Coal Co. v U.S., 21 Fed. (2) 489, *aff'd* 23 Fed. (2) 673.

⁷⁰ Russell Motor Car Co. v U.S., 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778; Strohmeier & Arpe Co. v U.S., 178 Fed. 268; Brown v Chicago, etc., R. Co., 102 Wis. 137, 77 N.W. 748, 78 N.W. 771, 44 L.R.A. 579.

⁷¹ City of Neenah v Krueger (Wis.) 240 N.W. 402.

⁷² Benson v Chicago, etc., R. Co., 75 Minn. 163, 77 N.W. 798; Brown v Chicago, etc., R. Co., 102 Wis. 137, 77 N.W. 748, 78 N.W. 771, 44 L.R.A. 579.

the general words will usually be construed to include only those persons or things of the same class or general nature as those specifically enumerated.⁷³ For example, where a law prohibits the exclusion of any persons on account of their color from "barber shops, eating houses, or other places of public resort," the latter phrase will be restricted to places of the same general character of those specifically enumerated.⁷⁴ This is the rule known as "*eiusdem generis*,"⁷⁵ and it is founded upon the idea that if the legislature intended the general words to be used in an unrestricted sense, the particular classes would not have been mentioned.⁷⁶ It is especially applicable to penal statutes.⁷⁷ But under no circumstances, and regardless of the type of statute involved, must the rule be used where the language of the statute under consideration is

⁷³ *Factor v Laubenheimer*, 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315; U.S. v *Certain Lands*, 12 Fed. Supp. 345; *Jones v State*, 104 Ark. 261, 149 S.W. 56; *Misch v Russell*, 136 Ill. 22, 26 N.E. 528, 12 L.R.A. 125; *State v Prather*, 79 Kan. 513, 100 Pac. 57; *State v Barge*, 82 Minn. 256, 84 N.W. 911, 53 L.R.A. 428; *In re Stryker*, 158 N.Y. 526, 53 N.E. 525; *Richmond First Nat. Bank v Holland*, 99 Va. 495, 39 S.E. 126, 55 L.R.A. 155. And naturally a clear indication to the contrary, will prevent such a construction. U.S. v *Salem*, 235 U.S. 237, 35 S.Ct. 51, 59 L.Ed. 210; *In re Chavez*, 34 N.M. 258, 280 Pac. 241, 69 A.L.R. 769. "While in the abstract, general terms are to be given their natural and full signification, yet where they follow specific words of a like nature, they take their meaning from the latter, and are presumed to embrace only things or persons of the kind designated by them." *Anderson v City of Hattiesburg*, 131 Miss. 216, 94 So. 163. Among the most prevalent of these comprehensive expressions, are "and all others", "any others", "or other business", *City of St. Louis v Laughlin*, 49 Mo. 559, "other persons", *Chapman v Woodruff*, 34 Ga. 91, "other property", *State v Black*, 75 Wis. 490, 44 N.W. 635, "others", *Kirkley v Portland Elec. Power Co.*, 136 Ore. 421, 298 Pac. 237; *Burns v Watertown*, 213 N.Y.S. 90, 126 Misc. 140.

⁷⁴ *Rhone v Loomis*, 74 Minn. 200, 77 N.W. 31.

⁷⁵ *Gooch v U.S. (U.S.)* 56 S.Ct. 395. See also *Spaldings v People*, 172 Ill. 40, 49 N.E. 993; *Brook v Cook*, 44 Mich. 617, 7 N.W. 216.

⁷⁶ *Ex parte Williams (Calif.)* 87 Pac. 565; *State v Campbell*, 76 Iowa 122, 40 N.W. 100; *Tucker v St. Louis-S. F. Ry. Co.*, 233 S.W. 512, aff'd 298 Mo. 511, 250 S.W. 390; *People v Edelstein*, 86 N.Y.S. 861, 91 Ap. Div. 447; *Hurt v Oak Downs (Tex.)* 85 S.W. (2) 295 (gambling statute held to include dog races).

⁷⁷ *Ex parte Muckenfuss*, 52 Tex. Cr. 467, 107 S.W. 1131; *Hurt v Oak Downs, Inc. (Tex.)* 85 S.W. (2) 294; U.S. v *Zumstein*, 24 Fed. Supp. 516.

plain⁷⁸ and there is no uncertainty.⁷⁹ Its use is permissible only as an aid to the court in its attempt to ascertain the intent of the lawmakers.⁸⁰ Nor will it be proper for the court to follow the rule where to do so will defeat or impair the plain purpose of the legislature.⁸¹ It cannot be employed to restrict the operation of an act within narrower limits than was intended by the lawmakers.⁸² Nor is the rule to be applied where specific words enumerate subjects which greatly differ from each other,⁸³ or where the specific words exhaust all the objects of the class mentioned.⁸⁴ Under these circumstances, the general words must have a different meaning from that of the specific words or be meaningless.⁸⁵ And, of course, the legislature cannot be presumed to have used any word without in-

⁷⁸ *U.S. v. Gallagher & Ascher* (U.S.) 12 Ct. Cust. Ap. 472; *Reynolds v. Reynolds* (Fla.) 152 So. 200; *Mills v. Barbourville*, 273 Ky. 490, 117 S.W. (2) 187.

⁷⁹ *Gooch v. U.S.* (U.S.) 56 S.Ct. 395; *State v. Miller*, 90 Kan. 230, 133 Pac. 878.

⁸⁰ *Mason v. U.S.*, 260 U.S. 545, 43 S.Ct. 200, 67 L.Ed. 396; *Baker v. Shinkle*, 249 Ill. 154, 94 N.E. 58; *Strange v. Board of Comrs.*, 174 Ind. 756, 91 N.E. 506; *State v. Miller*, 90 Kan. 230, 133 Pac. 878; *Keane v. Strodtman*, 323 Mo. 161, 18 S.W. (2) 896; *State v. McGillic*, 25 N.D. 27, 141 N.W. 82; *Kaiser v. Idleman*, 57 Ore. 224, 108 Pac. 193.

⁸¹ *Texas v. U.S.*, 292 U.S. 22, 54 S.Ct. 819, 78 L.Ed. 1042; *City of Philadelphia v. Standard Oil Co.*, 12 Fed. Supp. 647, aff'd 79 Fed. (2) 764; *Wiseman v. Affolter* (Ark.) 92 S.W. (2) 388. "The doctrine of *ijusdem generis* is only a rule of construction, to be applied as an aid in ascertaining the legislative intent and cannot control where the plain purpose and intent of the legislature would thereby be hindered or defeated." *Grosjean v. American Paint Works* (La.) 160 So. 449. Accordingly, the word "property" was held broad enough to include a motor truck in a statute making the city liable for damages "to persons and property". *Coleman v. Oakland* (Calif.) 295 Pac. 59.

⁸² *U.S. Cement Co. v. Cooper*, 172 Ind. 599, 88 N.E. 69.

⁸³ *Jones v. State*, 104 Ark. 261, 149 S.W. 56; *Donaghy v. State*, 6 Boyce (Dela.) 467, 100 Atl. 696; *McReynolds v. People*, 230 Ill. 623, 82 N.E. 945; *Phelps v. Common.*, 209 Ky. 318, 272 S.W. 743; *Brown v. Corbin*, 40 Minn. 508, 42 N.W. 481; *State v. Eckhardt*, 232 Mo. 49, 133 S.W. 321; *Corby Banking Co. v. Common.*, 123 Va. 10, 96 S.E. 133.

⁸⁴ *U.S. v. Mescall*, 215 U.S. 26, 30 S.Ct. 19, 54 L.Ed. 77; *State v. Smith*, 233 Mo. 242, 135 S.W. 465, 33 L.R.A. (n.s.) 179; *Kansas City Southern R. Co. v. Wallace*, 38 Okla. 233, 132 Pac. 908.

⁸⁵ *Mason v. U.S.*, 260 U.S. 545, 43 S.Ct. 200, 67 L.Ed. 396; *Gates v. Chandler* (Miss.) 165 So. 442; *Stoll v. Frank Adams Elec. Co.*, 299 Mo. 25, 240 S.W. 245, cert. quashed, 299 Mo. 25, 251 S.W. 917; *Weiss v. Swift*, 36 Pa. Super. 376; *State v. Savidge*, 144 Wash. 302, 258 Pac. 1.

tending that it mean something. Nor will the rule be applicable in one other situation; thus, where a statute enumerates persons or things of an inferior rank, dignity, or importance, it is not to be extended by the addition of general words to persons or things of a higher rank, dignity or importance than that of the highest enumerated, if there are any of a lower species to which the general words can apply.⁸⁶ And still further, in any case, the context of the whole statute may rebut the application of the rule of "*ejusdem generis*".⁸⁷ To hold otherwise, would make the legislative intent subordinate to the rule.

The application of the rule is clearly illustrated in *Hodgson v Mountain & Gulf Oil Co.* (297 Fed. 269, 272) where the statute provided that "All permits or leases hereunder shall inure to the benefit of the claimant and all other persons claiming through or under him by lease, contract or otherwise, as their interests may appear." The court refused to include a co-locator within the scope of the enactment, saying:

"What is the interpretation of the term 'otherwise' with respect to the classification which immediately precedes it? The *ejusdem generis* rule of statutory construction is that a 'clean-up' phrase of this character will include only things of a like or similar kind, and nothing of a higher class than that which it immediately follows."

But the rule cannot be used in order to defeat the legislative intent; it is not applicable where the legislative intent obviously makes it inapplicable, as was true in *State v Miller* (90 Kan. 230, 133 Pac. 878), where the defendant was charged with violating the statute which made it unlawful for any person to "willfully administer . . . any medicine, drug, or substance whatsoever, with intent thereby to procure abortion":

"It is vigorously urged that the absence of an allegation that the walking and running and the medicine given were calculated to produce an abortion and the failure to charge the

⁸⁶ *Woodworth v Paine's Adm'rs*, 1 Ill. 374. This principle is applicable to the enumeration of courts. *Chapman v Woodruff*, 34 Ga. 91.

⁸⁷ *Phelps v Common.*, 209 Ky. 318, 272 S.W. 473; *National Bank of Commerce v Ripley*, 161 Mo. 126, 61 S.W. 587. And see *People v Marquette National Fire Ins. Co.*, 351 Ill. 516, 184 N.E. 800: "This maxim, otherwise known as Lord Tenderden's rule, is one of numerous rules of construction. It does not apply where from the whole statute a larger intent may be gathered, if the application of the rule will operate to defeat such larger intent."

kind of substances administered render the information bad, and that the doctrine of *ejusdem generis* precludes embracing within the charge other than means kindred to the giving of drugs and the use of instruments. But viewed from a practical and commonsense standpoint it is clear enough that the defendant was very well advised that she was called on to meet a claim by the state that she had used the means indicated The legislature has made such conduct a crime without stopping to provide that the medicine, instruments or means used be such as are calculated to produce the intended result. The rule of *ejusdem generis* is merely one of construction, and like all the rest is useless when the intention is so plain as to require no resort to canons of construction. Such rules and canons are of use only when ambiguity or uncertainty calls for aids to a correct solution The phrase 'any instrument or means whatsoever' carries the facial evidence of a legislative intent to cover the extent of the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child. Whatsoever in the law, like whosoever in the gospel, is a word of the widest import. It is suggested that while one might administer a known deadly poison which would imply the intent to take life, he might give a substance not known to him to be naturally productive of an abortion, and hence to charge him criminally it would be necessary to aver knowledge. The fallacy of this argument as applied here lies in the fact that the statute has made it a crime to administer anything with intent . . . , thus making the act and intent sufficient regardless of the character of the substance administered."

§ 192. *Ejusdem Generis* Criticized.—This rule, like the maxim *expressio unius est exclusio alterius*, may be criticised because it is not necessarily in accord with the habits of speech of most people. According to an eminent authority on the interpretation of statutes,⁸⁸ it has "a little greater foundation in logic and in ordinary habits of speech" than has the other maxim. And so he continues:

"But for that very reason it is of limited importance in discovering the determinates covered by the statute. There is no case in which the words 'other' or 'any other' are used and applied, in which the same result could not have been reached if these words were absent. And where the courts have found that the phrase 'other' has the effect of enormously increasing the number of determinates, it is generally at the cost of making redundant all the previously enumerated ones. Thus we have the dilemma that when a long list of

⁸⁸ Landis, J. M., *Statutory Interpretation* (1930) 43 Harv. L.Rev. 886.

categories of things is supplemented by the phrase 'and others' we may either omit these words or omit the preceding list. The rule of *ejusdem generis* would have some value in cases in which the doctrine of 'strict construction' is applied."

If this criticism is well taken, as it seems to be, then the foundation of the rule would disappear, for the rule can be justified only as it is founded on human experience and probability. Nevertheless, where the statute is carefully constructed grammatically, the rule should be of some assistance to the court in ascertaining the legislative meaning, since those who drafted the statute most likely did so with the rule in mind.

§ 193. Relative and Qualifying Terms.—It may be stated as a general rule that a qualifying or relative word, phrase, or clause, such as "which", "said", and "such", is to be construed as applying to the word, phrase, or clause next preceding,⁸⁹ or, as is frequently stated, to the next preceding antecedent,⁹⁰ and not as extending to or including others more remote,⁹¹ unless a contrary intention appears.⁹² This rule, however, should not be utilized until other and more important rules of construction have proved futile.⁹³

⁸⁹ *Puget Sound Elec. Ry. Co. v Benson*, 253 Fed. 710; *Los Angeles County v Graves* (Calif.) 290 Pac. 444; *Stevens v Ill. Central R. Co.*, 306 Ill. 370, 137 N.E. 859; *Quinn v Lowell Elec. Light Corp.*, 140 Mass. 106, 3 N.E. 200; *Traverse City v Blair Township*, 190 Mich. 313, 157 N.W. 81; *State ex rel St. Louis Public Serv. Co. v Public Serv. Comm. (Mo.)* 34 S.W. (2) 486; *Nebraska State Ry. Comm. v Alfalfa Butter Co.*, 104 Neb. 797, 178 N.W. 766; *State v Bailey*, 67 Wash. 336, 121 Pac. 821. This is a rule of grammar as well as a rule of law. *Wood v Baldwin*, 10 N.Y.S. 195.

⁹⁰ This is sometimes called the doctrine of the last antecedent. *Town of Florence v Webb* (Ariz.) 9 Pac. (2) 413. "The last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence." *Traverse City v Blair Township*, 190 Mich. 313, 157 N.W. 81. And note *State ex rel Stewart v District Court*, 103 Mont. 487, 63 Pac. (2) 141, that a relative clause must be construed as relating to the nearest antecedent that will make sense. This is a better statement of the rule.

⁹¹ *Board of Port Com'rs v Williams* (Calif.) 60 Pac. (2) 454.

⁹² *Stevens v Ill. Central Ry. Co.*, 306 Ill. 370, 137 N.E. 859; *Marquette Cement Mfg. Co. v Fidelity & Dep. Co. (Miss.)* 158 So. 924; *Fowler v Tuttle*, 24 N.H. 9; *State v Navaro* (Utah) 26 Pac. (2) 955. The presumption that a relative pronoun or qualifying clause refers to the nearest antecedent is not rebutted by an inconsistent meaning due to the position of a comma. *Jorgenson v City of Superior*, 111 Wis. 561, 87 N.W. 565.

⁹³ *Town of Florence v Webb* (Ariz.) 9 Pac. (2) 413.

If there is something in the statute indicating that the relative word or qualifying provision is intended to apply other than to the next preceding antecedent, the rule obviously must be disregarded.⁹⁴

Only slight indication, however, is necessary in order to extend the scope of the relative term.⁹⁵ Such an extension may well be required by the natural and commonsense meaning of the statute,⁹⁶ and especially in order to avoid absurd results or to prevent a departure from the evident purpose of the legislature.⁹⁷ And where a clause, or phrase, follows several words to which it might be equally applicable, it should, if at all possible, be construed as applying to them all.⁹⁸ But a qualifying phrase appearing in a paragraph before a semi-colon does not bridge the semi-colon and qualify what follows it.⁹⁹

§ 194. Reddendo Singula Singulis.—It is also well established as a principle of statutory construction that words in different parts of a statute must be referred to their appropriate connection, giving to each in its place, its proper force and effect,¹⁰⁰ and, if possible, rendering none of them useless or superfluous,¹⁰¹ even if strict grammatical construction demands otherwise.¹⁰² This is the prin-

⁹⁴ State ex rel Crow v St. Louis, 174 Mo. 125, 73 S.W. 623, 61 L.R.A. 593. Moreover, the applicability of the above text is clearly shown in Myer v Ada County (Mont.) 293 Pac. 322, where the qualifying clause "on examination" was held to refer to the clause "all services and proceedings" and not solely to the last antecedent, in a statute reading: "For all services and proceedings before a justice of the peace, in a criminal action or proceeding on examination, when an examination is not waived, or trial upon an issue of fact, \$6.00."

⁹⁵ Myer v Ada County (Idaho) 293 Pac. 322; Gyer's Estate, 65 Pa. St. 311; Fisher v Connard, 100 Pa. St. 63.

⁹⁶ State ex rel Board of Com'rs v Zanesville, etc., Road Co., 16 Ohio St. 308.

⁹⁷ Ibid.

⁹⁸ U.S. v Standard Brewery, 251 U.S. 210, 64 L.Ed. 229, 40 S.Ct. 139. Also see Coxson v Doland (N.Y.) 2 Daly 66; Porto Rico Light & Power Co. v Mor, 253 U.S. 345, 40 S.Ct. 516, 64 L.Ed. 944, and King's Lake v Jamison, 176 Mo. 557, 75 S.W. 679.

⁹⁹ Orlosky v Haskell (Pa.) 115 Atl. 112.

¹⁰⁰ Common. v Barber, 143 Mass. 560, 10 N.E. 330.

¹⁰¹ McIntyre v Ingraham, 35 Miss. 25; Old Dominion Building & Loan Assoc. v Sohn, 54 W.Va. 101, 46 S.E. 222.

¹⁰² Common. v Barber, 143 Mass. 560, 10 N.E. 330.

ciple known as “*reddendo singula singulis*”. By virtue of it, if the sense of the statute so requires, and in order to further the intent of the legislature, the various words, clauses and phrases are to be taken distributively.¹⁰³

The following quotation from Dwarris will better illustrate this sort of interpretation:

“Although the intent of the legislature, is not to be collected from any particular expression, but from a general view of the whole of an act of parliament, it is often material to attend to the collocation of words in a sentence.

When words are at the beginning of a sentence, they may govern the whole as “*Nullus liber home*”;—All widows—“*Ensement et en meme le manere*”, etc.

When words are at the end of a sentence, they may refer to the whole. Thus the words, *per legem terroe*, in cap. 29 of Magna Charta, being towards the end of the chapter, have been always held to refer to all the precedent matter.

But if words are in the middle of a sentence, and sensibly apply to a particular branch of it, can they be extended to that which follows? Agreeably to reason, and in grammatical construction, it should seem not; but as statutes are read without breaks and stops, it is not any time clear, that words belong to any particular branch of a sentence; it must be collected from the context, to what they relate; and they are often, as will be seen to be read distributively—“*reddendo singula singulis*.”¹⁰⁴

The court in *S. S. Kresge Co. v. Ward* (279 U. S. 337, 49 S. Ct. 336, 73 L. Ed. 722) relied upon this general principle of construction in construing a statute which made it unlawful to sell at retail in any store or established place of business “any spectacles, eye glasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and (in) personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business”. As a result, the court found that the statute, when it required a physician or optometrist to be in charge of the

¹⁰³ *U.S. v Simms* (U.S.) 1 Cranch. 252, 2 L.Ed. 98; *U.S. v Hartwell* (U.S.) 6 Wall. 385, 18 L.Ed. 830; *Common. v Barber*, 143 Mass. 560, 10 N.E. 330.

¹⁰⁴ Dwarris (Potter) on Statutes, p. 217.

place of sale, meant that such physician or optometrist should be in charge by reason of and in the exercise of his professional capacity. Similarly, the rule was also used in *Quinn v Lowell Electric Light Corp.* (140 Mass. 106, 3 N.E. 200), where the legislative enactment provided for its adoption "at a legal meeting of the city council or the inhabitants of the town called for that purpose", and it was held that only in the case of a town was it necessary for a meeting to be called for the specific purpose.

Obviously, the maxim *reddendo singula singulis* finds its justification in our use of the English language. If this maxim, or some principle closely allied to it, were not used, many legislative enactments would be filled with inconsistencies. And in addition, it is doubtful whether the legislative intent could be ascertained, in many instances, at least, if every part of the statute were considered separately and apart from the other parts instead of distributively and in relation to all of the other words, phrases, and clauses of the enactment.

§ 195. Express Mention and Implied Exclusion (*Expressio Unius Est Exclusio Alterius*).—As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing.¹⁰⁵ It therefore logically follows that if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation

¹⁰⁵ *Walla Walla v Walla Walla Water Co.*, 172 U.S. 1, 19 S.Ct. 77, 43 L.Ed. 341; *Fidelity & Cas. Co. v Allen*, 84 Fed. (2) 53; *Havemeyer v Superior Court*, 84 Calif. 327, 24 Pac. 121; *Young v Regents of Kansas Univ.*, 87 Kan. 239, 124 Pac. 150; *Taylor v Mich. Pub. Util. Comm.*, 217 Mich. 400, 186 N.W. 485; *Matthews v Skinker*, 62 Mo. 329; *State v Driscoll (Mont.)* 54 Pac. (2) 571; *Page v Allen*, 58 Pa. St. 338; *Nelden v Clark*, 29 Utah 382, 59 Pac. 524; *Taylor v Taylor*, 66 W.Va. 238, 66 S.E. 690. This is a maxim, *City of Corpus Christi v McMurrey (Tex.)* 90 S.W. (2) 868, mot. den. 92 S.W. (2) 1108, or a rule of construction, *Yardley & Co. v U.S. (U.S.)* 22 C.C.P.A. 300, and not a constitutional command. *State v Driscoll (Mont.)* 54 Pac. (2) 571. Nor is it a rule of substantive law. *Union Light etc., Co. v Louisville, etc., R. Co.*, 257 Ky. 769, 79 S.W. (2) 195. "The maxim invoked expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances it is of deciding importance; in others, not." *United States v Barnes*, 222 U.S. 513, 32 S.Ct. 117, 56 L.Ed. 291. For application of the maxim to general and special legislation, see *State v Clark*, 25 N.J.L. 54.

and effect.¹⁰⁶ For instance, if the statute in question enumerates the matters over which a court has jurisdiction, no other matters may be included.¹⁰⁷ Similarly, where a statute forbids the performance of certain things, only those things expressly mentioned are forbidden.¹⁰⁸ So also, if the statute directs that certain acts shall be done in a specified manner,¹⁰⁹ or by certain person,¹¹⁰ their performance in any other manner than that specified, or by any other person than one of those named, is impliedly prohibited.¹¹¹

This maxim, or general principle of construction, as must be apparent, is based upon the probable intention of the legislature. Hence, where that intention clearly reveals that the lawmakers did not mean that the express mention of one thing should operate to exclude all others, of course, the principle is not applicable.¹¹² Consequently, where the statutory language is plain and the meaning

¹⁰⁶ Page v Bartlett, 101 Ala. 193, 13 So. 768; Johnston v Baker, 167 Calif 260, 139 Pac. 86; Village of Kincaid v Vecchi, 332 Ill. 586, 164 N.E. 199; Pierce v Bedkins, 185 Iowa 1346, 172 N.W. 191; Van Sweden v Van Sweden, 250 Mich. 238, 230 N.W. 191; Hendricks v Sweaney, 270 Mo. 685, 195 S.W. 714; Kruckman v Smith, 126 Ore. 395, 270 Pac. 474; Ex parte Brown, 21 S.D. 515, 114 N.W. 303; In re Downer's Estate, 101 Vt. 167, 142 Atl. 78. But the expression of one thing does not exclude another thing which is also expressed. Missouri Pub. Serv. Corp. v Fairbanks, 19 Fed. Supp. 38.

¹⁰⁷ Pannell v Box (Tex.) 78 S.W. (2) 209.

¹⁰⁸ Common. v Kammerer, 11 Ky. L. 777, 13 S.W. 108.

¹⁰⁹ Anderson v P. W. Madsen Inv. Co., 72 Fed. (2) 768; Schurtz v Grand Rapids, 208 Mich. 510, 175 N.W. 421; Keane v Strodman, 323 Mo. 161, 18 S.W. (2) 896; Fancher v Board of Com'rs, 28 N.M. 179; People v Gorman, 231 N.Y.S. 85, 133 Misc. 161; Harlan v Roberts, 2 Ohio Dec. (Reprint) 473; Scott v Ford, 52 Ore. 288, 97 Pac. 99; Taylor v Taylor, 66 W.Va. 238, 66 S.E. 690.

¹¹⁰ Taylor v Michigan Pub. Util. Comm., 217 Mich. 400, 186 N.W. 485. This may also include the maxim "*expressum facit cessare tacitum*" (when a law designates the actors, none others can come upon the stage). Taylor v Taylor, 66 W.Va. 238, 66 S.E. 690.

¹¹¹ Lubbock County School Trustees v Harral County School Dist. (Tex.) 95 S.W. (2) 204.

¹¹² Swick v Coleman, 218 Ill. 33, 75 N.E. 807; Kinney v Huerig, 44 Ind. Ap. 590, 87 N.E. 1053; Commerce Trust Co. v Paulen, 126 Kan. 777, 271 Pac. 338, 63 A.L.R. 384; Jefferson County v Gray, 198 Ky. 600, 249 S.W. 771; State v Commercial Nat. Bank, 170 La. 431, 127 So. 892; Lexington v Commercial Bank, 130 Mo. Ap. 687, 108 S.W. 1095; Connery v Sewell, 213 N.Y.S. 602, 126 Misc. 418; State v Whorton, 48 S.D. 332, 204 N.W. 169; State v Milwaukee Light, Heat & Traction Co., 166 Wis. 178, 164 N.W. 837.

clear, there can be no implied exclusion.¹¹³ In other words, the principle is to be used only as a means of ascertaining the legislative intent where it is doubtful,¹¹⁴ and not as a means of defeating the apparent intent of the legislature.¹¹⁵

Nor does this principle of construction have any application where the statute merely affirms existing law.¹¹⁶ Neither does it apply to matters omitted by oversight,¹¹⁷ or where it clearly appears that something was expressly mentioned for another reason or merely because of caution.¹¹⁸ Nor does this maxim or principle of construction have any application to the title of an act.¹¹⁹

As will appear in the discussion relative to the *ejusdem generis* rule, the rule that the expression of one thing is the exclusion of

¹¹³ *Riches v Hadlock (Utah)* 15 Pac. (2) 283. Also see *Gallagher v Camponodico*, 121 Calif. Ap. Supp. 765, 5 Pac. (2) 486.

¹¹⁴ *Forsythe v Paschall*, 34 Ariz. 380, 271 Pac. 865; *Jefferson County v Gray*, 198 Ky. 600, 249 S.W. 771; *Simmons v Suffolk County*, 230 Mass. 236, 119 N.E. 751; *Lexington v Commercial Bank*, 130 Mo. Ap. 687, 108 S.W. 1095; *In re Engel*, 140 N.Y.S. 286, 155 Ap. Div. 467; *E. M. Matthews Co. v Atlantic Coast Line R. Co.*, 102 S.C. 494, 86 S.E. 1069; *American Rio Grand Land & Irr. Co. v Karle (Tex.)* 237 S.W. 358. And see *Taylor v Michigan Pub. Util. Comm.*, 217 Mich. 400, 186 N.W. 485, "that there are some instruments or laws to which such maxims cannot be strictly applied, without doing manifest violence to the plain intent of the framers of the law, is also a matter of common experience."

¹¹⁵ *Fazio v Pittsburg Rys. Co.*, 321 Pa. 7, 182 Atl. 696.

¹¹⁶ *People ex rel Park Reservoir Co. v Hinderlider*, 98 Colo. 505, 57 Pac. (2) 894. Also see *In re Atkin's Estate*, 30 Fed. (2) 761, that the Louisiana courts do not always apply this maxim: "The administration of the law of Louisiana is not hampered by technical and unsubstantial distinctions. In the absence of a positive statute, it is the duty of the courts to apply principles of equity, appealing to natural law and reason and recognized usages in support of those principles." Hence, an enumeration of the natural obligations in a statute, as sufficient consideration for a new contract, was held to be merely illustrative and not exclusive. Moreover, the expression of one thing in a statute is exclusive when it is creative or in derogation of some existing law. So a statute requiring that an order granting a new trial on the ground of insufficiency of the evidence to sustain the verdict shall so specify, was not applicable to an order based on the insufficiency of evidence to sustain the decision of the court in a case tried without a jury, on the theory that the express application to one case excluded the application to the other. *Gruben v Leebrick (Calif.)* 84 Pac. (2) 1078.

¹¹⁷ *U.S. v Cheeseman (U.S.)* Fed. Cas. No. 14,790.

¹¹⁸ *Brown v Buzan*, 24 Ind. 194; *Woolsey v Culp*, 74 N.Y. 82.

¹¹⁹ *May v Polk Co.*, 124 Fla. 534, 169 So. 41, Ap. Dis. 57 S.Ct. 39.

another, is also in direct contradiction to the habits of speech of most persons. For this reason, the rule must be applied with extreme caution. Perhaps it can be safely applied only where the legislative enactment appears to be carefully drawn in the light of existing rules of construction. Perhaps the rule's proper status is indicated in *State ex rel Curtis v De Corps* (134 Ohio St. 295, 16 N.E. (2) 459):

"This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment . . . The maxim of interpretation is often helpful but its wise application varies with the circumstances."

§ 196. Grammar—In General.—Since one may assume that the legislature knew and understood the rules of grammar,¹²⁰ such rules should be considered by the courts in their efforts to ascertain the meaning of a statutory enactment,¹²¹ on the theory that they will reveal or tend to reveal the correct sense or meaning thereof.¹²² Nevertheless, such rules are not to be blindly followed in the interpretation of statutes.¹²³ They may be disregarded, if by doing so,

¹²⁰ *U.S. v Goldenberg*, 168 U.S. 95, 18 S.Ct. 3, 42 L.Ed. 394.

¹²¹ *Gilbert v Green*, 185 Ky. 817, 216 S.W. 105; *State v Scaffer*, 95 Minn. 311, 114 N.W. 139; *State v Louisiana, etc., R. Co.*, 215 Mo. 279, 114 S.W. 956; *State v Anderson (Mont.)* 13 Pac. (2) 231; *Wood v Baldwin*, 10 N.Y.S. 195; *Harris v Common.*, 142 Va. 620, 128 S.E. 578. "To get at the thought or meaning expressed in a statute . . . the first resort, in all cases, is to the natural significance of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." *Lake County v Rollins*, 130 U.S. 662, 9 S.Ct. 651, 32 L.Ed. 1060. "Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent. A proviso is construed to apply to the provision, or clause, immediately preceding." *State ex rel Crow v St. Louis*, 174 Mo. 125, 73 S.W. 623, 61 L.R.A. 593.

¹²² *Lake County v Rollins*, 130 U.S. 662, 9 S.Ct. 651, 32 L.Ed. 1060; *State v Minneapolis Milk Co.*, 124 Minn. 34, 144 N.W. 417; *Parker v Nothomb*, 65 Neb. 308, 91 N.W. 395, 93 N.W. 851, 60 L.R.A. 699; *Samuelson v State*, 116 Tenn. 470, 95 S.W. 1012.

¹²³ "Grammar may, no doubt, sometimes render assistance to law by helping to the construction, and thereby to the meaning of a sentence; but grammar, with reference to a living, and therefore a variable language, is perhaps more difficult to deal with than law, and the rules of legal construction are more certain than the rules of grammatical construction." *The Eastern Counties, etc., Ry. Cos. v Marriage (Eng.)* 9 H.L.C. 32, 62.

the legislative intent will be made effective.¹²⁴ They may also be disregarded, modified, or extended where a strict adherence to them would operate to defeat the obvious intention of the lawmakers, and especially where they will lead to repugnancy, inconsistency or absurdity.¹²⁵ Indeed, the court may go so far as to rearrange a sentence in order to carry out the obvious legislative intent.¹²⁷ In other words, the true meaning of a statute must prevail, although it conflicts with the strict rules of grammar.¹²⁸

But in case of doubt, the rules of grammar may justify the acceptance of a particular construction.¹²⁹ And besides, such rules may also operate to corroborate a certain construction and thereby confirm it as the intent of the legislature, especially where the statute seems to be carefully constructed grammatically.

§ 197. Inaccurate, Inapt and Awkward Language.—There is also a presumption that the legislature knew the meaning of the words which it has used in an enactment.¹³⁰ This presumption, however, like all other presumptions, may be rebutted. Moreover,

¹²⁴ *Larkins v State* (Md.) 162 Atl. 195. Also see *Rutherford v Green*, 2 Wheat. (U.S.) 196, where the tense was altered.

¹²⁵ *Higgins v Hubbs*, 31 Ariz. 252, 252 Pac. 515; *Ex parte Haines*, 195 Calif. 605, 234 Pac. 883; *State v Swails*, 194 Ind. 338, 142 N.E. 706; *State ex rel v Mooneyham*, 212 Mo. Ap. 573, 253 S.W. 1098; *State v Centennial Brewing Co.*, 55 Mont. 500, 179 Pac. 296; *In re Bickerton*, 232 N.Y. 1, 133 N.E. 41; *State v Humphries*, 210 N.C. 406, 186 S.E. 473; *Armitage v Crawford County*, 24 Pa. Co. 207; *Blais v Franklin*, 31 R.I. 95, 77 Atl. 172; *Fremont v Pennington County*, 20 S.D. 270, 105 N.W. 929; *Harris v Common.*, 142 Va. 620, 128 S.E. 578; *Popham v Patterson* (Tex.) 51 S.W. (2) 680.

¹²⁶ *Fisher v Connard*, 100 Pa. 63.

¹²⁷ *Ex Parte Telu Sekuguchi*, 123 Calif. Ap. 537, 11 Pac. (2) 655; *Dunbar v Fant*, 170 S.C. 414, 170 S.E. 460; *Looney v Common.*, 145 Va. 825, 133 S.E. 753.

¹²⁸ *U.S. v Lacher*, 134 U.S. 624, 10 S.C. 625, 33 L.Ed. 1080; *Ludlow v Johnson*, 3 Ohio 553; *Samuelson v State*, 116 Tenn. 470, 95 S.W. 1012. "If possible, all parts of a statute should be viewed in connection with the whole, and made to harmonize so as to give a sensible effect to each. The different portions of a sentence, or different sentences are to be referred respectively to the other portions or sentences to which we can see they relate, even if strict grammatical construction should demand otherwise." *Common. v Barber*, 143 Mass. 560, 10 N.E. 330.

¹²⁹ *Peoria First Nat. Bank v Farmers Nat. Bank*, 171 Ind. 323, 82 N.E. 1013, 86 N.E. 417.

¹³⁰ *U.S. v Goldenberg*, 168 U.S. 95, 18 S.Ct. 3, 42 L.Ed. 394.

many laws contain words which have not been used accurately. But the use of inapt or inaccurate language or words, will not vitiate the statute if the legislative intention can be ascertained.¹³¹ The same is equally true with reference to awkward, slovenly, or ungrammatical expressions;¹³² that is, such expressions and words will be construed as carrying the meaning the legislature intended that they bear,¹³³ although such a construction necessitates a departure from the literal meaning of the words used.¹³⁴ And the court may go further; even the arrangement of the words and phrases, in a statute may be disregarded,¹³⁵ where the statute in its enacted form on its face is without meaning,¹³⁶ in order that it may give expression to the legislative intent, if one be ascertainable, from the words actually employed.

§ 198. Statutes Without Meaning—Indefinite Terms.—We have seen,¹³⁷ that awkward, ungrammatical, inaccurate and inapt

¹³¹ *St. Louis, etc., R. Co. v State*, 86 Ark. 518, 112 S.W. 150; *Common. v Grinstead*, 108 Ky. 59, 55 S.W. 720; *Pullen v Corp. Comm.*, 152 N.C. 548, 68 S.E. 155; *McKee Land & Imp. Co. v Williams*, 71 N.Y.S. 1141, 63 Ap. Div. 553. "The authorities would seem, rather, to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language does not really express the intention." *Common. v Barney*, 115 Ky. 475, 74 S.W. 181.

¹³² *Kelly's Heirs v McGuire*, 15 Ark. 555; *Murray v State*, 21 Tex. Ap. 620, 2 S.W. 757.

¹³³ *Alfrey v Colbert*, 168 Fed. 231; *White v State*, 121 Ga. 592, 49 S.E. 715; *State ex rel Mo., Mut. Life Ins. Co. v King*, 44 Mo. 283; *Burt v Rattle*, 31 Ohio St. 116; *Territory v Ashenfelter*, 4 N.M. (Johns) 85, 12 Pac. 879.

¹³⁴ *Ibid.*

¹³⁵ *U.S. v Lacher*, 134 U.S. 624, 10 S.Ct. 625, 33 L.Ed. 1080; *Parker v Nothamb*, 65 Neb. 308, 91 N.W. 395, 93 N.W. 851, 60 L.R.A. 699; *Radcliff v State*, 106 Tex. Cr. 37, 289 S.W. 1072.

¹³⁶ *Murray v State*, 21 Tex. Ap. 620, 2 S.W. 757. Also see *infra*, § 198.

¹³⁷ See *supra*, § 197. *Wing v Ryan*, 278 N.Y. 710, 17 N.E. (2) 133.

expressions, will not generally of themselves vitiate a statute, if the court, by the process of interpretation, can ascertain with reasonable certainty what the legislature meant.¹³⁸ Nevertheless, a statute to be valid must be capable of construction; that is, it must have an ascertainable intelligible meaning.¹³⁹ If the statute cannot be given an intelligible meaning, because of the uncertainty, indefiniteness and vagueness of its terms, it will be wholly inoperative.¹⁴⁰ But the court must first resort to and use every authorized means

¹³⁸ *Fortune v Board of Com'rs*, 91 N.C. 550; *State v Harden*, 62 W.Va. 313, 58 S.E. 715; *Palms v Shawno County*, 61 Wis. 211, 21 N.W. 77. And see *Sullivan v Brawner* (Ky.) 36 S.W. (2) 364: ". . . it may be stated generally, as one of the fundamental rules governing the validity of a statute, that, if it is couched in language so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the legislature intended, or so incomplete that it cannot be executed it will be declared to be inoperative and void." This was the case in *United States v Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045, where the words: "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities," were held to forbid no specific or definite act. In *Hygrade Provision Co. v Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402, however, the word "kosher" and the phrase "orthodox Hebrew religious requirements" were regarded as sufficiently definite and certain and consequently prescribed an ascertainable standard of guilt, in a statute forbidding the sale of any meat falsely represented to be kosher.

¹³⁹ *State v Partlow*, 91 N.C. 550. But before it will be invalid, the vagueness and uncertainty must be such that a person of ordinary intelligence cannot understand it. *Ex parte Leach*, 215 Calif. 536, 12 Pac. (2) 3.

¹⁴⁰ *Hewitt v State Board of Med. Exam.*, 148 Calif. 590, 84 Pac. 39 (license statute); *Ex parte Slaughter*, 92 Tex. Cr. 212, 243 S.W. 478, 26 A.L.R. 891 (speed of motor vehicle). *Contra*: *State v Knowles*, 90 Md. 646, 45 Atl. 877, 49 L.R.A. 695; *People v McCoy*, 125 Ill. 289, 17 N.E. 786; *Lawrence v Board of Med.*, 239 Mass. 424, 132 N.E. 174. For further discussion of meaningless statutes, see Freund, *Use of Indefinite Terms in a Statute*, 24 Col. L.Rev. 193 (1924) *Aigler, Legislation in Vague and General Terms*, 21 Mich. L.Rev. 831 (1923), and Note (1931) 44 Harv. L.Rev. 1139.

in its attempt to ascertain that meaning,¹⁴¹ although, of course, it cannot supply a meaning where the language is susceptible of none.¹⁴² If there is no indication of the intention of the legislature, obviously, it will be impossible for the court to discover one or make it effective. In some instances, however, indefinite general terms, if preceded by specific terms, may be rendered definite and hence operative by the doctrine of *ejusdem generis*.¹⁴³

The rule that a statute will be inoperative if the court cannot give it a definite meaning is especially applicable to criminal acts.¹⁴⁴ It is reasonable that a fair warning should be given to the world, in language that the ordinary man will understand, of what the law intends to do if a certain line is passed, although ordinarily it is not likely that a criminal will carefully consider the text of the law before he violates it.¹⁴⁵ It would certainly be a dangerous practice, nevertheless, if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to say who could be rightfully retained and who should be set free. This would, to some

¹⁴¹ State v Partlow, 91 N.C. 550. And see Drake v Drake, 15 N.C. 110: "Whether a statute be a public or private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible." In fact, the court may even reject the words of a statute, in order to find the legislative intent, Foster v Sawyer County, 197 Wis. 218, 221 N.W. 786; Roby v Hawthorne (Tex.) 84 S.W. (2) 1108, especially where it appears that such words have inadvertently crept into the statute, State v Caldwell, 170 La. 851, 129 So. 368, but not if an intent can be discovered from the statute. Chesapeake, etc., R. Co. v Hewin, 152 Va. 49, 148 S.E. 794. The same is true with reference to the addition of words. Litchfield v City of Bridgeport, 103 Conn. 565, 131 Atl. 560. Also see §§ 200-201, *infra*.

¹⁴² Diemer v Weiss (Mo.) 122 S.W. (2) 922; McConvill v Mayor of Jersey City, 39 N.J.L. 38; State v Partlow, 91 N.C. 550.

¹⁴³ Foreman v State Board of Health, 157 Ky. 123, 162 S.W. 796; Morse v State Board of Med. Exam., 57 Tex. Civ. Ap. 93, 122 S.W. 449. Similarly, the indefiniteness of a clause may be removed by construction with the context of the statute. State v Lebow, 128 Kan. 15, 280 Pac. 773.

¹⁴⁴ Sullivan v Brawner (Ky.) 36 S.W. (2) 364; State v Boone, 1 N.C. 191; McConvill v Mayor of Jersey City, 39 N.J.L. 38. But note Evans v Common. (Mass.) 3 Metc. 453. And see U.S. v Alford, 274 U.S. 264, 47 S.Ct. 597, 71 L.Ed. 1040, where the word "near" in a statute forbidding the building of a fire near inflammable grass, was held not to be too indefinite.

¹⁴⁵ McBoyle v U.S. (U.S.) 51 S. Ct. 340.

extent, substitute the judicial for the legislative department of the government.¹⁴⁶

§ 199. **Punctuation.**¹⁴⁷—Of course, the punctuation of a statute may lend some assistance in its construction, but when the intention of the statute and the punctuation thereof are in conflict, the former must control,¹⁴⁸ even where the punctuation is regarded as a part of

¹⁴⁶ U.S. v Reese, 92 U.S. 214, 23 L.Ed. 563. "The court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is to be found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one. The court may not allow 'conjectural interpretation to usurp the place of judicial expression.' There must be a competent and efficient expression of the legislative will." State v Partlow, 91 N.C. 550.

¹⁴⁷ It is quite generally stated that the punctuation of a statute is no part of the statute. Hammock v Loan & Trust Co., 105 U.S. 77, 26 L.Ed. 1111; In re Schilling, 53 Fed. 81, 3 C.C.A. 440; Bruner v Smith (S.C.) 198 S.E. 184. But see Tyrrell v City of N.Y., 159 N.Y. 239, 53 N.E. 1111; State v Desforges, 147 La. Ann. 1167, 17 So. 711; Blood v Beal, 100 Me. 30, 60 Atl. 427, contra. "This general rule in its origin was founded upon common sense, for in England until 1859 statutes were enrolled upon parchment and enacted without punctuation. No punctuation appearing upon the rolls of Parliament, such, as was found in the printed statutes, simply expressed the understanding of the printer. Such a rule is not applicable to conditions where, as in this state, a bill is printed and is on the desk of every member of the legislature, punctuation and all, before its final passage. There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the interpretation of statutes." Taylor v Caribou, 102 Me. 401, 67 Atl. 2. And note U.S. ex rel Palermo v Smith, 17 Fed. (2) 534, rev. 11 Fed. (2) 980, that the semi-colon is a part of the statute. For further treatment of the subject of punctuation, see Lavery, Punctuation in the Law (1923) 9 A.B.A.J. 225.

¹⁴⁸ Erie R. Co. v U.S., 240 Fed. 28, 153 C.C.A. 64; Jones v State, 104 Ark. 261, 149 S.W. 56; Kubis v Town of Cornwall, 95 Conn. 720, 112 Atl. 663; People v James, 328 Ill. 262, 159 N.E. 194; In re Petersen's Will, 186 Iowa 75, 172 N.W. 206; Taylor v Caribou, 102 Me. 401, 67 Atl. 2; Klug v Fuller, 194 Mich. 41, 160 N.W. 589; Dukate v Adams, 101 Miss. 433, 58 So. 475; State v Walker, 302 Mo. 116, 257 S.W. 470; Brown v Roberts, 78 Mont. 301, 254 Pac. 419; Tyrrell v N.Y., 159 N.Y. 239, 53 N.E. 1111; Pape v Hollopeter, 125 Ore. 34, 265 Pac. 445; Kitchen v Southern R. Co., 68 S.C. 554, 48 S.E. 4. "With us, the punctuation is the work of the draftsman, the engrosser, or the printer. In the legislative body, the bill is read, so that the ear, not the eye, takes cognizance of it. Therefore, the punctuation is not . . . of controlling effect in the interpretation." Manger v Board of Med. Exam., 90 Md. 659, 668, 45 Atl. 891, 893. As to the effect of brackets, see Ann. Cas. 1917 D, 468.

the statute.¹⁴⁹ In other words, the punctuation will not control the plain meaning of the text of an enactment.¹⁵⁰ It is subordinate to the text,^{150a} and the retention of a word is of far more importance than the position of a comma.¹⁵¹ Indeed, the court may punctuate, or disregard existing punctuation, or repunctuate in order to give the legislative intention effect.¹⁵² Thus, a semi-colon may be placed where a comma appears,¹⁵³ or a semi-colon substituted in lieu of the word "and".¹⁵⁴

But where a statute is ambiguous, its punctuation may and should be considered and given weight,¹⁵⁵ especially where the act

¹⁴⁹ *Taylor v Caribou*, 102 Me. 401, 67 Atl. 2; *Kitchen v Southern R. Co.*, 68 S.C. 554, 48 S.E. 4; *Bradstreet v Gill*, 72 Tex. 115, 9 S.W. 753.

¹⁵⁰ *Ex parte Davis* (Calif.) 63 Pac. (2) 853; *City of N.Y. v Globe Neon Tube Corp.*, 264 N.Y.S. 331, 147 Misc. 515.

^{150a} *Rocca v Boyle*, 166 Calif. 94, 135 Pac. 34; *Slingluff v Weaver*, 66 Ohio St. 621; *Glendon v City of N.Y.*, 294 N.Y.S. 890.

¹⁵¹ *Common. v Shopp* (Pa.) 1 Woodw. Dec. 123; *Hamilton v Hamilton*, 16 Ohio St. 429.

¹⁵² *Hammock v Loan & Trust Co.*, 105 U.S. 77, 26 L.Ed. 1111; *Koser v Oliver* (Ark.) 54 S.W. (2) 411; *Page v Ewell*, 81 Colo. 73, 253 Pac. 1059; *State v Deuel*, 63 Kan. 811, 66 Pac. 1037; *Grieb v National Bond & Inv. Co.*, 264 Ky. 289, 94 S.W. (2) 612; *Browne v Turner*, 174 Mass. 150, 54 N.E. 510; *Dukate v Adams*, 101 Miss. 433, 58 So. 475; *Reitz v Juniata County*, 19 Pa. Dist. 767; *McKenzie v Douglas County*, 81 Ore. 442, 159 Pac. 625. But see *Tuohey v Martinjak*, 119 Conn. 500, 177 Atl. 721, where commas could not be disregarded, since they had been used in the enactment under consideration in previous revisions.

¹⁵³ *State v Humphries*, 210 N.C. 406, 186 S.E. 473.

¹⁵⁴ *Blass Co., Inc. v U.S. (U.S.)* 12 C.C.P.A. 481.

¹⁵⁵ *Gutschalk v Peck*, 261 Fed. 212; *People v James*, 328 Ill. 262, 159 N.E. 194; *Seller v State*, 160 Ind. 605, 65 N.E. 922, 66 N.E. 946, 67 N.E. 448; *Taylor v Caribou*, 102 Me. 401, 67 Atl. 2; *Redmond v State*, 155 Md. 13, 141 Atl. 383; *Hopkins v Hopkins* (Mass.) 192 N.E. 145; *Tyrrell v N.Y.*, 159 N.Y. 239, 53 N.E. 1111; *State v Bell*, 184 N.C. 701, 115 S.E. 190. "The punctuation of this statute is of material aid in learning the intention of the legislature . . . The punctuation, however, is subordinate to the text, and is never allowed to control its plain meaning; but when the meaning is not plain, resort may be had to those marks which for centuries have been in common use to divide into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear." *Tyrrell v New York*, 159 N.Y. 239, 53 N.E. 1111. The application of this rule clearly appears in *Common. v Kelley*, 177 Mass. 221, 58 N.E. 691, where the statute involved appeared as follows: ". . . that no sale of spirituous or intoxicating liquor shall be made between the hours of eleven at night and six in the morning; nor during the Lord's day; except that if the licensee is also licensed as an innholder, he may supply such liquor to guests who have resorted to his house for food and lodgings," and the semi-colon was held to indicate that the exception did not apply to sales made between the hours of eleven and six.

is carefully punctuated.¹⁵⁶ If the punctuation is in accord with the suggested meaning of the statute, it is an important additional reason for the acceptance of that meaning.¹⁵⁷ It should be given weight,¹⁵⁸ unless, from the inspection of the whole statute, it is apparent that the punctuation must be disregarded in order to arrive at the legislative intention.¹⁵⁹

And yet, since it would seem from all of the foregoing that punctuation cannot be relied upon as an infallible guide to the meaning of a statute,¹⁶⁰ perhaps those cases which allow its use only when all other means have proved futile,¹⁶¹ announce the most practical rule, unless the court can be sure that the statute was accurately punctuated when enacted.

§ 200. Alteration, Interpolation and Elimination of Words and Phrases.—As we have already stated,¹⁶² the intention of the legislature must be primarily ascertained from the language used. This obviously means, as a general rule, that the courts have no power to add to, or to change, alter, or eliminate the words which the legislature has incorporated in a statute,¹⁶³ not even in order to provide

¹⁵⁶ *Alexander v Graves* (Miss.) 173 So. 417.

¹⁵⁷ *U.S. v Hart*, 26 Philippine 149. This is especially true in penal statutes. *Biens v State*, 206 Ind. 482, 190 N.E. 170.

¹⁵⁸ *Ex parte Telu Sekirguchi* (Calif. Ap.) 11 Pac. (2) 655.

¹⁵⁹ *Illinois Bell Tel. Co. v Ames*, 364 Ill. 362, 4 N.E. (2) 494.

¹⁶⁰ *Northern Pac. R. Co. v U.S.*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544; *State v McNally*, 34 Me. 210; *State v Fabbri*, 98 Wash. 207, 167 Pac. 133. "Punctuation is the most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by the four corners, in order to ascertain its true meaning. If that is apparent on judicially inspecting it, the punctuation will not be suffered to change it." *Ewing's Lessee v Burnet* (U.S.) 11 Pet. 41, 9 L.Ed. 624, cited and approved in *Howard Savings Institution v Mayer*, 63 N.J.L. 65, 42 Atl. 848.

¹⁶¹ *Snow v Benton*, 299 Fed. 695; *State v Baird* (Ariz.) 288 Pac. 1; *Withers v Common.*, 109 Va. 837, 65 S.E. 16; *State v Fabbri*, 98 Wash. 207, 167 Pac. 133.

¹⁶² See §§ 159, 169 and 185, *supra*.

¹⁶³ *U.S. v Fox*, 95 U.S. 670, 24 L.Ed. 538; *Folsom v U.S.*, 160 U.S. 121, 16 S.Ct. 491, 40 L.Ed. 363; *Richmond v Moore*, 107 Ill. 429; *King v Viscolid Co.*, 219 Mass. 420, 106 N.E. 988; *Ex parte Wood*, 52 Tex. Cr. 575, 108 S.W. 1171.

for certain contingencies which the legislature failed to meet,¹⁶⁴ or to avoid hardship flowing from the language used,¹⁶⁵ or to advance the remedy of the statute.¹⁶⁶

There are, however, some occasions when words may be interpolated. The court may do so when the meaning of the legislature is not clear,¹⁶⁷ if the statute may thereby be made sensible and the legislative intent effective,¹⁶⁸ provided, of course, that the words added were unintentionally omitted by the legislature.¹⁶⁹ Accordingly, the words "user or operator" were inserted before the words "may receive" in a statute defining prohibited slot machines, so as to give the statute grammatical form and an intelligible meaning and carry out the legislative intent.¹⁷⁰ In other words, it is plainly proper for the courts to supply evident inadvertent legislative omissions by the interpolation of words necessary to complete the sense

¹⁶⁴ *Rosecrans v U.S.*, 165 U.S. 257, 17 S.Ct. 302, 41 L.Ed. 708; *U.S. v Goldenburg*, 168 U.S. 95, 18 S.Ct. 3, 42 L.Ed. 394. And note *U.S. v Lexington Mill, etc., Co.*, 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658; *Havemeyer v Superior Court*, 84 Calif. 327, 24 Pac. 121, 10 L.R.A. 627; *State v Lowry*, 166 Ind. 372, 77 N.E. 728; *Cronan v Cotting*, 104 Mass. 245; *Ballard v Miss. Cotton Oil Co.*, 81 Miss. 507, 34 So. 533; *St. Johns v Andrews Institute*, 191 N.Y. 254, 83 N.E. 981.

¹⁶⁵ *Vukovich v St. Louis, etc., Co. (N.M.)* 60 Pac. (2) 356.

¹⁶⁶ *U.S. v Chase*, 135 U.S. 255, 10 S.Ct. 756, 34 L.Ed. 117.

¹⁶⁷ *Cherry v Leonard (Ark.)* 75 S.W. (2) 401; *Smith v State*, 66 Md. 215, 7 Atl. 49; *State v Humphries*, 210 N.C. 406, 186 S.E. 473.

¹⁶⁸ *Winter v Hindin*, 33 Dela. 294; *Abernathy v Mitchell*, 113 Ga. 127, 38 S.E. 303; *State v Taylor*, 90 Kan. 438, 133 Pac. 861; *James v U.S. Fidelity & Guar. Co.*, 133 Ky. 299, 177 S.W. 406; *State ex rel v Mooneyham*, 212 Mo. Ap. 573, 253 S.W. 1098; *Comm. v Lowe Coal Co.*, 296 Pa. 359, 145 Atl. 916; *Johnson v Baker*, 149 Tenn. 613, 259 S.W. 909; *Johnson v Barman*, 99 Va. 305, 38 S.E. 136; *Hood v City of Wheeling*, 85 W.Va. 578, 102 S.E. 259; *State v State R. Comm.*, 137 Wis. 80, 117 N.W. 846; *Bench Canal Co. v Sullivan*, 39 Wyo. 345, 271 Pac. 221. If the meaning is sensible with or without the omitted word, no interpolation is permitted. *State ex rel Everding v Simon*, 20 Ore. 365, 26 Pac. 170. But see *Loper v State*, 82 Minn. 71, 84 N.W. 650; *Osborne v Simpson*, 94 Fla. 793, 114 So. 543.

¹⁶⁹ *Burns v Industrial Comm.*, 356 Ill. 602, 191 N.E. 225; *City of Spartanburg v Leonard*, 180 S.C. 491, 186 S.E. 395.

¹⁷⁰ *State v Humphries*, 210 N.C. 406, 186 S.E. 473.

of the statute and to harmonize it with the obvious legislative intent.¹⁷¹

This end may also justify the alteration of words which already appear in the statute.¹⁷² For example, in a statute defining industrial insurance as insurance for which stipulated premiums were regularly payable every calendar month, or at less stated intervals, and policies or benefit certificates which were for sums of \$500.00 or less on a single life *on* which policies or benefit certificates provided cash benefits for disability, the word "on" could be read as "or" in order to make the language comprehensible.¹⁷³ So, too, words appearing in a statute may be omitted or eliminated if no sensible

¹⁷¹ *Landrum v Flannigan*, 60 Kan. 436, 56 Pac. 753. Conversely, words are not to be supplied or changed, unless as they stand they are clearly inconsistent with the obvious purpose of the act. *Gleason Coal Co. v U.S.*, 30 Fed. (2) 22; *Lane v Schomp*, 20 N.J. Eq. 82. Illustrative of the above text, is the case of *Haworth v Chapman*, 113 Fla. 591, 152 So. 663, in which a statute was involved that provided that a person guilty of certain conduct should be deemed guilty of a felony, and be "fined not more than \$10,000 and ten years in the state penitentiary," and the words "imprisoned for" before "ten years" was held inadvertently omitted and consequently properly supplied by the court. And note the statement of the rule in *Boise Street Car Co. v Ada County*, 50 Idaho 304, 296 Pac. 1019, 1021: "Undoubtedly, in certain cases, the courts do have the power to read words into an act. But it is a power that should be exercised with caution, and should be indulged in only when the omission is palpable and the omitted word clearly indicated by the context. Where the omission is not plainly indicated, and the statute as written, is not incongruous or unintelligible, and leads to no absurd results, the court is not justified in making an interpolation."

¹⁷² *Keller v State (Ariz.)* 47 Pac. (2) 442; *Uphoff v Industrial Board*, 271 Ill. 312, 111 N.E. 128; *Andrews School Town v Heiney*, 178 Ind. 1, 98 N.E. 628; *Young v Regents of Univ.*, 87 Kan. 239, 124 Pac. 150. A negative, by virtue of this principle, may be read as an affirmative, *U.S. v Matagrín*, (U.S.) 1 Ct.Cus.Ap. 309, or two negatives as an affirmative, *Hedrick v Pack*, 106 W.Va. 322, 145 S.E. 606, and plural words as singular; *In re Eikel*, 283 Fed. 285; *State v Holder*, 49 Idaho 514, 290 Pac. 387; *Jocelyn v Barrett*, 18 Ind. 128; *Gorthy v Jarvis*, 15 N.D. 509, 108 N.W. 39; *Hogan v State*, 36 Wis. 226, and vice versa; *In re Eikel*, 283 Fed. 285; *Chicago & W. I. R. Co. v Heidenreich*, 254 Ill. 231, 98 N.E. 567; *Garrigus v Parke County*, 39 Ind. 66; *Greenleaf v Woods*, 29 Ky. L. 723, 96 S.W. 458; *Garrett v Wiltse*, 252 Mo. 699, 161 S.W. 694; *Follmer v State*, 94 Neb. 217, 142 N.W. 908; *Gorthy v Jarvis*, 15 N.D. 509, 108 N.W. 39. And note *First National Bank v Missouri*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486, aff. 297 Mo. 397, 249 S.W. 619, 30 A.L.R. 918.

¹⁷³ *Dominique v Washington Nat. L. Ins. Co. (La.)* 166 So. 628; *West v Lysle*, 302 Pa. 147, 153 Atl. 131.

meaning can be given to them,¹⁷⁴ or no meaning consonant with the legislative intent as it appears or can be gathered from the entire statute,¹⁷⁵ or if they have been inserted through inadvertence.¹⁷⁶ Similarly, an unnecessary clause may be deleted.¹⁷⁷

But the rule should be always kept in mind that full effect should be given to every word of the statute, if at all possible; that

¹⁷⁴ *Waters-Pierce Oil Co. v Deselms*, 212 U.S. 159, 53 L.Ed. 453, 29 S.Ct. 270; *Crawford v Payne* (Calif.) 55 Pac. (2) 1240; *Paxton Irr. Canal Co. v Farmers Irr. Co.*, 45 Neb. 884, 64 N.W. 343, 29 L.R.A. 853; *State v Acuff*, 6 Mo. 54; *State v Barker*, 50 Utah 189, 167 Pac. 262. Also note the following language from *Landrum v Flannigan*, 60 Kan. 436, 56 Pac. 753: "The plaintiff in error contends that in the interpretation of the statute the last enumeration of classes of persons should be eliminated, because wholly tautological and adding nothing to the meaning of the section. To do so would, of course, correct the composition to accord with rhetorical rules, but it would not make the legal sense of the act any clearer. The interpretation of a statute by the elimination of some of its words may be sometimes allowable, Endlich, *Interp. Stat.* §§ 301, 302, but only, we think as to words which are wholly meaningless, or which being contradictory of the evident intent of the legislature, are therefore rejected by the inherent sense of the whole act. The words of enumeration last used are unnecessary, but they are not meaningless. They are not contradictory of anything else in the statute. On the contrary they are in harmony with its other parts. They are simply incomplete as an evidently purposed enumeration or list. We follow a safer rule by allowing the inadvertently omitted classes mentioned in the preceding clause a place in the list with them."

¹⁷⁵ *Carlson v Mullen*, 29 Idaho 795, 162 Pac. 332; *Common. v Grinstead*, 108 Ky. 59, 55 S.W. 720; *State v Caldwell*, 170 La. 851, 129 So. 368; *State ex rel v Mooneyham*, 212 Mo. Ap. 573, 253 S.W. 1098; *State v Bates*, 96 Minn. 110, 104 N.W. 709; *People v Draper*, 154 N.Y.S. 1034, 169 Ap. Div. 479; *Kitchen v Southern R. Co.*, 68 S.C. 554, 48 S.E. 4.

¹⁷⁶ *U.S. v Jackson*, 143 Fed. 783, 75 C.C.A. 41; *In re Vanderberg*, 28 Kan. 243; *Settlers Irr. Dist. v Settlers Canal Co.*, 14 Idaho 504, 94 Pac. 829; *County Board of Elect. Comr's v State ex rel Sides*, 148 Ind. 675, 48 N.E. 226; *Rose v Sullivan*, 56 Mont. 480, 185 Pac. 562; *Davis v State*, 88 Tex. Cr. 183, 225 S.W. 532; *Neavy v Board of Super's*, 144 Wis. 210, 128 N.W. 1063.

¹⁷⁷ *Cherry v Leonard* (Ark.) 75 S.W. (2) 401. Also see *Foster v Sawyer*, 197 Wis. 218, 221 N.W. 768. But see *Landrum v Flannigan*, 60 Kan. 436, 56 Pac. 753, where the words must not only be unnecessary but meaningless.

the court should always seek to harmonize and make every part of the statute operative. In other words, no part of a statute—whether it be sentence, clause, phrase, or word—should be considered as mere surplusage or as devoid of meaning, if it can possibly be avoided.¹⁷⁸ Words may be disregarded only in order to conform with or to effectuate the legislative intent,¹⁷⁹ and not to alter or change it.¹⁸⁰

§ 201. Correction of Mistakes, Errors, Omissions and Misprints.

—As we have indicated in the preceding section, if the true meaning of the legislature appears from the entire enactment, errors, mistakes, omissions and misprints may be corrected by the court, so that the legislative will may not be defeated.¹⁸¹ As a result, spelling,¹⁸²

¹⁷⁸ *Leversee v Reynolds*, 13 Iowa 310; *State v Acuff*, 6 Mo. 54; *Hagenbuck v Reed*, 3 Neb. 17.

¹⁷⁹ *Litchfield v City of Bridgeport*, 103 Conn. 565, 131 Atl. 560; *Leversee v Reynolds*, 13 Iowa 310; *West v Lysle*, 302 Pa. 147, 153 Atl. 131; *Roby v Hawthorne (Tex.)* 84 S.W. (2) 1108.

¹⁸⁰ *State v Dudley*, 159 La. 872, 106 So. 364; *State v Certain Intoxicating Liquors*, 71 Mont. 79, 227 Pac. 472.

¹⁸¹ *Mier v Superior Ct.*, 67 Calif. Ap. 135, 227 Pac. 490; *Earhart v State*, 67 Miss. 325, 7 So. 347; *State v Humphries*, 210 N.C. 406, 186 S.E. 473; *In re Nicholson's Estate*, 300 Pa. 299, 150 Atl. 466; *Roby v Hawthorne (Tex.)* 84 S.W. (2) 1108; *McKay v Dept. of Labor*, 180 Wash. 191, 39 Pac. (2) 997, 98 A.L.R. 990. "An obvious clerical error can be corrected by construction, as e.g., the reference to a wrong date, or to a wrong chapter or section number of a statute when the intended reference is clear. Certain defects of expression are so common that the judicial power with regard to them has become well established, particularly the word 'and' in a disjunctive sense instead of the word 'or'." Freund, *Interpretation of Statutes* (1916) 65 Pa. Law Rev., 207, 219. And note where an obvious error was corrected and a criminal conviction thereby sustained. *People v Swatser*, 1 Dak. 295: But note *State v Squibb*, 179 Ind. 488, 84 N.E. 969 and *U.S. v Ten Cases of Shawls*, Fed. Cas. No. 16448.

¹⁸² *In re Petersen's Will*, 186 Iowa 75, 172 N.W. 206; *Crowley v Arcadia Parish Police Jury*, 138 La. 488, 70 So. 487, err. dis. 245 U.S. 637, 62 L.Ed. 524, 38 S.Ct. 191; *State ex rel v Mooneyham*, 212 Mo. Ap. 573, 253 S.W. 1098; *Looney v Common.*, 145 Va. 825, 133 S.E. 753.

grammar,¹⁸³ numbers,¹⁸⁴ and even words,¹⁸⁵ may be corrected. This, as already stated, is simply making the strict letter of a statute yield to the obvious intent of the legislators.¹⁸⁶ But it must clearly, or at least with reasonable certainty, appear that the error is in fact one before the court will be justified in making the proper correction or amendment¹⁸⁷ or the court will invade the province of the legislature and exercise legislative power. But when satisfied of the error, the court may make the necessary correction. In accord with this principle, an erroneous description may be made to describe the thing actually intended¹⁸⁸ or a misnomer made to name the thing

¹⁸³ *In re Petersen's Will*, 186 Iowa 75, 172 N.W. 206.

¹⁸⁴ *Capp v People*, 64 Colo. 58, 170 Pac. 399; *State v Horn*, 126 Kan. 591, 270 Pac. 597; *Neutzel v Ryans*, 184 Ky. 292, 211 S.W. 852; *State v Rogers*, 148 La. 653, 87 So. 504; *Lowell v Washington County R. Co.*, 90 Me. 80, 37 Atl. 869; *State ex rel School Dist. v Hackman*, 302 Mo. 558, 258 S.W. 1011; *People v Lord*, 41 N.Y.S. 343, 9 Ap. Div. 458; *People v Hill*, 3 Utah 334, 3 Pac. 75; *State v Cross*, 44 W.Va. 315, 29 S.E. 527.

¹⁸⁵ *Gleason Coal Co. v U.S.*, 30 Fed. (2) 22; *State v Bracken*, 154 Ala. 151, 45 So. 841; *Speer v Stephenson*, 16 Idaho 707, 102 Pac. 365; *State v Horn*, 126 Kan. 591, 270 Pac. 597; *Golightly v Bailey*, 218 Ky. 794, 292 S.W. 320; *State v Rogers*, 148 La. 653, 87 So. 504; *Roseberry v Norsworthy*, 135 Miss. 845, 100 So. 514; *State ex rel Am. Mfg. Co. v Koeln*, 278 Mo. 28, 211 S.W. 31; *Fortune v Buncombe County*, 140 N.C. 322, 52 S.E. 950; *Lancaster County v Lancaster City*, 170 Pa. 108, 32 Atl. 567; *State v Temple*, 142 Tenn. 466, 220 S.W. 1084; *State v Hall*, 120 Wash. 449, 207 Pac. 685; *Anderson v Town of Friendly*, 86 W.Va. 554, 104 S.E. 48; *Foster v Sawyer County*, 197 Wis. 218, 221 N.W. 768. And note especially the case of *Black v Louisiana Central Lumber Co.*, 161 La. 889, 109 So. 538, where, in a statute reading: ". . . where the usefulness of a member of any physical function is seriously permanently impaired," the word "of" after "member" was read as "or", since it was obviously a typographical error. In a case such as this, could there be any possible doubt concerning the real intention of the lawmakers with reference to the use of the wrong word inadvertently? Also see *State ex rel American Mfg. Co. v Koeln*, 278 Mo. 28, 211 S.W. 31, where "assessor" was changed to "collector".

¹⁸⁶ *Comm. v Hearld Pub. Co.*, 128 Ky. 424, 108 S.W. 892; *State v Polk County*, 87 Minn. 325, 92 N.W. 216, 60 L.R.A. 161; *Securities Corp. v Hooton*, 53 Okla. 530, 157 Pac. 293; *Kitchen v Southern R. Co.*, 63 S.C. 554, 48 S.E. 4.

¹⁸⁷ "The power is undoubted but it can only be exercised when the error is so manifest upon an inspection of the act, as to preclude all manner of doubt . . ." *In re Frey*, 128 Pa. 593, 18 Atl. 478; *Haworth v Chapman*, 113 Fla. 591, 152 So. 663 ("with reasonable certainty").

¹⁸⁸ *Spear v Stephenson*, 16 Idaho 707, 102 Pac. 365; *Stoneman v Whaley*, 9 Iowa 390; *White v State*, 121 Ga. 592, 40 S.E. 715; *In re Frey*, 128 Pa. 593, 18 Atl. 478; *Palms v Shawno County*, 61 Wis. 211, 21 N.W. 77. Also see Note 1 Ann. Cas. 752.

really meant.¹⁸⁹ It is important, however, to note that there is a distinction between a misdescription or a misnomer and an ambiguous description or designation.¹⁹⁰ In the former the legislative object may be ascertained or identified, while frequently in the latter it cannot.¹⁹¹

§ 202. **Foreign Languages.**¹⁹²—In some jurisdictions, statutes may be enacted in more than one language.¹⁹³ Where this is the situation, both texts constitute the law and each must be considered in ascertaining the meaning of the legislature.¹⁹⁴ It may be provided by statute, however, that one text shall control the other; but even in this case, in the event of any ambiguity in the controlling text, resort to the other would seem proper in order to remove the doubt.¹⁹⁵

¹⁸⁹ *Mankel v U.S.* (U.S.) 19 Ct. Cl. 295; *State ex rel State Agric. Soc. v Timme*, 56 Wis. 423, 14 N.W. 604; *Coney v Topeka*, 96 Kan. 46, 149 Pac. 689 (numbers).

¹⁹⁰ See *Blanchard v Sprague*, Fed. Cas. No. 1, 517; *State v Partlow*, 91 N.C. 550.

¹⁹¹ *State v Partlow*, 91 N.C. 550. Also see *Blanchard v Sprague*, 3 Sumner 279, where the descriptive words constituted the very essence of the act.

¹⁹² For additional treatment, see *Ruppenthal, English and Other Languages under American Statutes* (1920), 54 Am.L.Rev. 39, and *Keith, Bilingual Laws*, 5 J.Comp.Leg. (3rd Series) 124 (1923).

¹⁹³ In some states, constitutional provisions require statutes to be enacted in the English language only. See *Constitutions of Illinois, Kansas and Michigan*.

¹⁹⁴ *State v Mix (La.)* 8 Rob. 549; *State v Moore (La.)* 8 Rob. 177; *San Juan v Porto Rico Coal Co.*, 28 Porto Rico 245; *People v Alvarez*, 28 Porto Rico 882; *Davis v Montreal*, 27 Can. S.C. 539; *Roy v Davidson*, 15 Que. Super. 83. And note *People v Agosto*, 10 Porto Rico 425, that the original controlled the translation, and *Sample v Whitaker (La.)* 135 So. 38, that, in case of conflict between the English and French texts of the Code of 1825, the latter prevails. Also see *State v Ellis*, 12 La. Ann. 390, where the English text, in which all laws were required to be enacted, controlled the French translation, by virtue of the constitution. And note *Viterbo v Friedlander*, 120 U.S. 707, 30 L.Ed. 776, 7 S.Ct. 962.

¹⁹⁵ *State v Fontenot*, 112 La. 628, 36 So. 630; *People v Alvarez*, 28 Porto Rico 882.

CHAPTER XX

INTRINSIC AIDS IN THE INTERPRETATION AND CONSTRUCTION OF STATUTES

§ 203. In General.

§ 204. The Context.

§ 205. The Preamble.

§ 206. The Title.

§ 207. Chapter, Article and Section Headings, and Marginal Notes.

§ 208. Legislative Definitions and Interpretation Clauses.

§ 203. **In General.**—Naturally, the first as well as the best source from which to ascertain the meaning of any statute is the statute itself—its words, grammar, punctuation, context, title and the like. Certain of these elements, such as the words, the grammar and punctuation, which perhaps could also be logically treated in this chapter, have been already discussed.¹ Consequently, there is no necessity for repetition or additional treatment.

§ 204. **The Context.**—The words, phrases, clauses, sections, subsections, provisos, saving clauses, in fact, every part of the statute,

¹ See *supra*, Chapter XIX, Linguistic and Grammatical Construction.

must be interpreted with reference to the context.² This means that the court in construing a statute cannot isolate words³ or give them their abstract meaning,⁴ or consider the different parts of the statute

² *Oglesby Coal Co. v Comm. of Internal Revenue*, 46 Fed. (2) 617; *Standard Oil Co. v McLaughlin* (C.C.A.—Calif.) 67 Fed. (2) 111 (“accrued”); *First Trust Co. v Kansas Life Ins. Co.* (C.C.A.—Minn.) 79 Fed. (2) 48 (sub-section); *Armstrong v Sellers*, 182 Ala. 582, 62 So. 28; *Ex parte Haines*, 195 Calif. 605, 234 Pac. 883; *State v Jones*, 34 Idaho 83, 199 Pac. 645; *Board of Educ. v Morgan*, 316 Ill. 143, 147 N.E. 34; *Seiler v State*, 160 Ind. 605, 65 N.E. 922, 66 N.E. 946, 67 N.E. 448; *Griffith v Carter*, 8 Kan. 565; *Phelps v Common.*, 209 Ky. 318, 272 S.W. 743; *Moulton v Scully*, 111 Me. 428, 89 Atl. 944; *In re Corby’s Estate*, 154 Mich. 353, 117 N.W. 906; *State ex rel Buchanan County v Imel*, 280 Mo. 554, 219 S.W. 634; *Ex parte Lockhart*, 72 Mont. 136, 232 Pac. 183; *State v Paterson*, 35 N.J.L. 196; *Wilson v Israel*, 227 N.Y. 423, 125 N.E. 819; *Gill v Board of Comrs.*, 160 N.C. 176, 76 S.E. 203; *Williams v Rheas, Inc.*, 99 Pa. Super. 438; *Houston v Potter*, 41 Tex. Civ. Ap. 381, 91 S.W. 389; *Popham v Patterson* (Tex.) 51 S.W. (2) 680 (emergency clause); *State v Hendrickson*, 67 Utah 15, 245 Pac. 375, 57 A.L.R. 786; *Jones v Rhea*, 130 Va. 345, 107 S.E. 814; *State v Gregory* (Wis.) 232 N.W. 546. But note, *State v Vosgien*, 82 Wash. 685, 144 Pac. 947. For a definition of “context”, see *Black, Int. Laws* (2nd Ed.) p. 242: “When we speak of the ‘context’, it is not meant merely that different words or clauses in the same sentence must be compared with each other or successive sentences be read together. But in a wider sense, one section of a statute may stand, as context to another, whether it immediately precedes or follows it or is more widely separated from it, provided it bears upon the same general subject-matter.”

³ *Quinones v Perez*, 32 Porto Rico 442; *Brown ex rel Gray v Quinttilian*, 121 Conn. 300, 184 Atl. 382; *In re Webbs Estate*, 90 Colo. 470, 10 Pac. (2) 947. “Such an interpretation of the language can only be reached by singling out and giving to the word ‘distribution’ the one meaning suggested by appellant, whereas it has many meanings and uses, and the rules of statutory construction require that a statute be construed from its four corners and not by singling out a particular word or phrase.” Hence, where a statute imposed a tax on gas plants in the city “and used for local sale and distribution in said town or city,” the word “distribution” was used in the sense of delivery and as a result it was not necessary that the gas be delivered to two or more customers. *Utilities Natural Gas. Co. v State* (Tex.) 118 S.W. (2) 927.

⁴ *McIntyre v Ingraham*, 35 Miss. 25.

separately and independently.⁵ Every part of the statute must be considered together,⁶ and considered as an integral part of the whole,⁷ and kept subservient to the general intent of the whole enactment.⁸ Each part or section of the statute subject to construction should be construed in connection with every other part or section,⁹ even sections which are invalid,¹⁰ or in conflict.¹¹ Indeed all of the parts must be given effect according to the intent expressed or clearly revealed.¹²

The importance of taking the context of the statute subject to construction into consideration may be gathered from an examination of a few cases where the context was considered by the court. For instance, in *Dixon v La Guardia* (166 N. Y. S. (2) 466, 166 Misc. 889), a construction made in the light of the context of the law resulted in a finding that an employee of the city could not have his pay certified in the amount adopted by the board of estimate and apportionment in its budget for the city:

⁵ *Larkin v U.S.* (C.C.A.—S.D.) 78 Fed. (2) 951; *State v Lee Chue*, 130 Ore. 99, 279 Pac. 285; *Williams v McDonald*, 4 Chand. 65. And see *Great Southern L. Ins. Co. v Cunningham* (Tex.) 97 S.W. (2) 692, that the subdivisions of a statute setting forth eleven provisions which must be included in all policies of life insurance, must be construed together. Also see *Buchsbaum & Co. v Beman* (D.C.—Ill.) 14 Fed. Sup. 444, that the collective bargaining provisions of the National Labor Relations Act must be read in connection with the provisions for judicial review and enforcement of the board's orders.

⁶ *In re Plumer* (D.C.—Calif.) 9 Fed. Sup. 923 (Frazier-Lemke amendment); *Morgan v Jewell Constr. Co.* (Mo.) 91 S.W. (2) 638; *Lynch v Long Branch*, 111 N.J.L. 148, 167 Atl. 664; *Rees v Teachers Retirement Bd.*, 247 N.Y. 372, 160 N.E. 644 (if no definition of the word used is given).

⁷ See § 165, *supra*.

⁸ *O'Neill v Seglin Constr. Co.*, 268 N.Y.S. 849, 158 Misc. 742.

⁹ *People ex rel Barrett v West Side Trust*, 362 Ill. 607, 1 N.E. (2) 81. The division of a statute into sections is an artificial arrangement so far as construction is concerned. *Ex parte Telu Sekuguchi*, 123 Calif. Ap. 537, 11 Pac. (2) 655.

¹⁰ *Sylvester v Buda Co.*, 281 Ill. Ap. 139; *Beneficial Loan Soc. v Haight* (Calif.) 11 Pac. (2) 857; *Crooks v People's Finance Co.*, 111 Calif. Ap. Supp. 769, 292 Pac. 1065.

¹¹ *City of Covington v State Tax Comm.*, 257 Ky. 84, 77 S.W. (2) 386.

¹² *Henry v McCormack Bros.* (Ala.) 167 So. 256. This may even justify the correction of mistakes, errors or omissions, provided the intention of the legislature can be gathered from the whole enactment. *State v Brandt*, 41 Iowa 593; *Peck v Weddell*, 17 Ohio St. 271; *Custin v Viroqua*, 67 Wis. 314.

“It is a familiar rule of statutory construction that all of the words of a statute must be read in the light of its entire text. A study of the powers and duties conferred by the Greater New York Charter on the board of estimate and apportionment leads to the inescapable conclusion that the method of procedure in the making of a budget was separate, distinct, and different than the method of procedure with respect to any of the powers and duties conferred upon the board.”

The context also played a controlling role in *Dyer v Dyer* (212 N. C. 620, 194 S. E. 278), where the defendant was held properly subject to attachment for contempt for his wilful failure to pay his wife subsistence according to an order entered by his consent, in an action therefor, without a divorce:

“The defendant contends, however, that the word ‘alimony’ as used in the said proviso has a technical, rather than a broad meaning, and limits and confines the provisions thereof to judgments in actions brought by the wife against the husband for divorce from bed and board. With this we do not agree.

Manifestly the legislature, in dealing with the subject of alimony to meet various situations, intended to protect the faithful wife in her right to be supported and provided for by the husband. The words ‘alimony’ and ‘subsistence’ have a kindred meaning.

If the meaning of the statute were in doubt reference may be had to the title and context as legislative declarations of the purpose of the act.”

Perhaps no case sheds greater light upon the value of the context in the construction of a statute than *Raynor v United States* (302 U.S. 540, 58 S.Ct. 353, 82 L.Ed. 413) which involved the federal counterfeiting act:

“There is no inconsistency in the act unless it is assumed that the word ‘obligations’ refers to genuine obligations only. Since words that have one meaning in a particular context frequently have different significance in another, it is necessary to consider the context of the words ‘such obligations’ in order to determine their significance. The provision of law here construed is the last of seven separate offenses set out in one paragraph of a chapter of the Criminal Code entitled ‘Offenses Against the Currency’. The provisions of this chapter were enacted to prevent and punish counterfeiting. Six closely connected companion offenses are set out in the same section with the offense charged against respondents and all either penalize the possession of or trafficking in, counterfeit obligations or the materials and devices used to make such obligations.

Examining the context of the words under consideration, we find that the word 'obligations' appears throughout the chapter relating to offenses against the currency, and does not always apply to 'genuine' obligations, but may, and often does, refer to counterfeit or spurious obligations."

Thus, by construing the provisions of a statute with reference to the context, ambiguities may be removed,¹³ words of doubtful meaning made plain,¹⁴ errors corrected,¹⁵ and apparent inconsistencies reconciled.¹⁶ And as a general rule, a statutory provision must be given the meaning which will best harmonize with the context.¹⁷

§ 205. The Preamble.¹⁸—If the enacting part of the statute is ambiguous, resort may be had to the preamble for assistance in the ascertainment of the statute's meaning.¹⁹ Conversely, if the body

¹³ *U.S. v Pirates*, 5 Wheat. (U.S.) 184, 5 L.Ed. 64; *Crone v State*, 49 Ind. 538; *State ex rel Harper v Judge*, 12 La. Ann. 777; *In re Corby's Estate*, 154 Mich. 353, 117 N.W. 906; *State v Mo. Pac. Ry. Co.*, 219 Mo. 156, 117 S.W. 1173; *Hidalgo County Drainage Dist. v Davidson*, 102 Tex. 539, 120 S.W. 849, and see *Cooper v Shaver*, 101 Pa. 547.

¹⁴ *Passaic Nat. Bank v Eelman*, 116 N.J.L. 279, 183 Atl. 677.

¹⁵ *Blanchard v Sprague*, 3 Sumn. 279, Fed. Cas. No. 1,517; *Turner v State*, 40 Ala. 21; *Nichols v Halliday*, 27 Wis. 406.

¹⁶ *U.S. v Baltimore & O. S. W. R. Co.*, 159 Fed. 33, 86 C.C.A. 223.

¹⁷ *In re Lawrence v Cedarhurst Bank*, 285 N.Y.S. 950, 158 Misc. 451.

¹⁸ For definition of the preamble, see § 88, supra. In *Mace v Cadell*, 98 Eng. Reprint, 1060, a preamble is set forth which may be used as an illustration: "And for that it often falls out that many persons before they become bankrupts, do convey their goods to other men, upon good consideration, yet still do keep the same, and are reputed owners thereof, and dispose of the same as their own. Be it enacted, etc., etc."

¹⁹ *Price v Forrest*, 173 U.S. 410, 19 S.Ct. 434, 43 L.Ed. 749; *Oliver v Southern Trust Co.*, 138 Ark. 381, 212 S.W. 77; *Bentley v State Board of Medical Examiners*, 152 Ga. 836, 111 S.E. 379; *People v Chicago, etc., R. Co.*, 296 Ill. 246, 129 N.E. 846; *Huff v Fetch*, 194 Ind. 570, 143 N.E. 705; *Lelly v City of Richmond Heights*, 322 Mo. 1024, 18 S.W. (2) 394; *Brown v Erie R. Co.*, 87 N.J.L. 487, 91 Atl. 1023; *Briedwell v Henderson*, 99 Ore. 506, 195 Pac. 575; *Tripp v Goff*, 15 R.I. 299, 3 Atl. 591; *Common. v Smith*, 76 Va. 477; *Huntworth v Tanner*, 87 Wash. 670, 152 Pac. 523. "A preamble may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient when not restrained, or may be resorted to in explanation of the enacting clause, if it be doubtful. This is the whole extent of the influence of the title and preamble in the construction of the statute." 1 Kent, Comm. 462; also see *White v Levy*, 91 Ala. 175, 8 So. 563. The preamble of a resolution may also be considered in seeking the meaning of an ambiguous provision. *Ex parte Kelly* (N.J. Ch.) 198 Atl. 203.

of the statute is clear and explicit, its meaning cannot in any manner be affected by the preamble.²⁰ And more specifically, where the enabling part of a statute is clear, it is not to be restrained by the preamble.²¹ This is true because the preamble is not an essential part of a statute.²²

But where doubt exists regarding the proper construction of the body of the statute, in many cases, there is no better source than the preamble for aid in the ascertainment of the intention of the legislature, since it contains a statement of the purpose, reason or occasion for the enactment of the law to which it is affixed.²³ Consequently, the provisions of the act must be considered as having been enacted with these various purposes in view.²⁴ In it a guide may be found to the true meaning of the act.²⁵ However, inasmuch as the preamble is not truly a part of the law of the statute, the scope of the statute should not be enlarged by the preamble,²⁶ especially where the statute is unambiguous and clear.²⁷ Nor should it be per-

²⁰ *Holbrook v Holbrook*, 1 Pick. (Mass.) 248; *Lackland v Walker*, 151 Mo. 210, 52 S.W. 414; *Neuman v City of N.Y.*, 122 N.Y.S. 62, 137 Ap. Div. 55; *Bynum v Clark*, 14 S.C.L. 298; *Common. v Smith*, 76 Va. 477; *Huntworth v Tanner*, 87 Wash. 670, 152 Pac. 523.

²¹ See *Copeman v Gallant* (Eng.) P. Wm. 314. But note *White v Levy*, 91 Ala. 175, 8 So. 563.

²² *Yazoo, etc., R. Co. v Thomas*, 132 U.S. 174, 10 S.Ct. 68, 33 L.Ed. 302; *State v Ohio Oil Co.*, 150 Ind. 21, 49 N.E. 809, 47 L.R.A. 627. Also see *Carter v Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (*Bituminous Coal Conservation Act*).

²³ *Hanly v Sims*, 175 Ind. 345, 93 N.E. 228, 94 N.E. 401; *Montesque v Heil*, 4 La. 51. But note *Priewe v Wisconsin State Land Improvement Co.*, 103 Wis. 537, 79 N.W. 780, that too much reliance should not be placed on the preamble, as it may erroneously state the reasons for the enactment.

²⁴ *Board of Trustees v U.S.*, 20 C.C.P.A. 134, cert. gr. 287 U.S. 596, 53 S.Ct. 315, 77 L.Ed. 520, aff. 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025.

²⁵ *City of Spartanburg v Leonard*, 180 S.C. 491, 186 S.E. 395.

²⁶ *Yazoo, etc., R. Co. v Thomas*, 132 U.S. 174, 10 S.Ct. 68, 33 L.Ed. 302; *In re American States P. S. Co. (D.C.—Md.)* 12 Fed. Supp. 667, mod. 81 Fed. (2) 721, cert. den. 56 S.Ct. 670; *Portland Van & Storage Co. v Hoss* (Ore.) 9 Pac. (2) 122; *State v Thurston County Super. Ct.*, 92 Wash. 16, 159 Pac. 92. And see *Lackland v Walker*, 151 Mo. 210, 52 S.W. 414; *Common. v Smith*, 76 Va. 477; *Slack v Jacob*, 8 W.Va. 612. *Contra*: *Brown v Erie R. Co.*, 87 N.J.L. 487, 91 Atl. 1023; also see *Beaver County v Home Indemnity Co. (Utah)* 52 Pac. (2) 435, that it is entitled to minor weight. *White v Levy*, 91 Ala. 175, 8 So. 563.

²⁷ *Brown v Erie R. Co.*, 87 N.J.L. 487, 91 Atl. 1023. Also see cases under note 20, *supra*.

mitted to contradict the clear intent of the legislature, as evidenced by the enacting clause of the statute.²⁸

§ 206. **The Title.**²⁹—The title of a statute may also be resorted to when the statute must be construed in order to ascertain the meaning of the legislature;³⁰ that is, if the statute is ambiguous, the title may be considered,³¹ as an aid in ascertaining the legislative intent.³² If the statute is clear and unambiguous, conversely, it must

²⁸ *In re American Surety Co. (Pa.)* 181 Atl. 364. For effect of the preamble in determining the object of the act or the mischief to be remedied, see *Beaty v Knowler (U.S.)* 4 Pet. 152, 7 L.Ed. 813.

²⁹ For definition and general discussion of the status of the title, see *supra*, § 87 and § 95, et seq.

³⁰ *Baxter v McGee (C.C.A.—Ark.)* 82 Fed. (2) 695; *State v Bradshaw (Mont.)* 43 Pac. (2) 674; *Addotta v Blunt*, 114 N.J.L. 85, 176 Atl. 105; *Sherwin v Jonas*, 269 N.Y.S. 121, 150 Misc. 342; *Ellis v Greene*, 191 N.C. 761, 133 S.E. 395. The title is indicative of the legislative intent in enacting the statute in question, *Barney v Bd. of Commissioners*, 93 Mont. 115, 17 Pac. (2) 82; also see *State v Seegmund*, 125 Ore. 197, 266 Pac. 1075, and consequently may be resorted to for assistance in ascertaining the intent of the legislature.

³¹ *Briggs v Walker*, 171 U.S. 466, 19 S.Ct. 1, 43 L.Ed. 243; *U.S. v Katz*, 271 U.S. 354, 46 S.Ct. 513, 70 L.Ed. 986; *City of Conway v Summers*, 176 Ark. 796, 4 S.W. (2) 19; *Cohen v Barrett*, 5 Calif. 195; *Kendall v People*, 53 Colo. 100, 125 Pac. 586; *State v Yeats*, 74 Fla. 509, 77 So. 262; *Bentley v State Board of Medic. Examiners*, 152 Ga. 836, 111 S.E. 379; *State v Paulsen*, 21 Idaho 686, 123 Pac. 588; *Perry County v Jefferson County*, 94 Ill. 214; *Cyrus v State*, 195 Ind. 346, 145 N.E. 497; *Cook v Federal Life Assoc.*, 74 Iowa 746, 35 N.W. 500; *Common. v Barnette*, 196 Ky. 731, 245 S.W. 874; *State v Am. Sugar Ref. Co.*, 138 La. 1005, 71 So. 137; *Engel v City of Baltimore*, 140 Md. 284, 117 Atl. 901; *Brown v Robinson (Mass.)* 175 N.E. 269; *In re Graves (Mo.)* 30 S.W. (2) 149; *State v Duncan*, 55 Mont. 376, 177 Pac. 248; *State v City of Lincoln*, 101 Neb. 57, 162 N.W. 138; *State v Sargent*, 24 N.M. 344, 171 Pac. 790; *People v Van Wych*, 157 N.Y. 495, 52 N.E. 559; *Dunn v Dunn*, 199 N.C. 535, 155 S.E. 165; *Olson v Erickson*, 56 N.D. 468, 217 N.W. 841; *State v Viner*, 164 N.E. 119, 119 Ohio St. 303; *Turnridge v Thompson*, 89 Ore. 637, 175 Pac. 281; *Glen Alden Coal Co. v City of Scranton*, 282 Pa. 45, 127 Atl. 307; *Blais v Franklin*, 31 R.I. 95, 77 Atl. 172; *Robson v Cantwell*, 143 S.C. 104, 141 S.E. 180; *Common. Ins. Co. v Finegold (Tex. Civ. Ap.)* 183 S.W. 833; *Byrd v Common.*, 124 Va. 833, 98 S.E. 632; *State v Superior Court*, 70 Wash. 442, 126 Pac. 945; *State v Hohle (Wis.)* 234 N.W. 735; *Ward v Board of Comrs.*, 36 Wyo. 460, 256 Pac. 1039. But note *Hough v Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. The title may correct, by interpretation, patent errors in the purview of a statute. *Wilson v Spaulding*, 19 Fed. 304.

³² *Holder v Elms Hotel Co. (Mo.)* 92 S.W. (2) 620.

not be considered.³³ The same is equally true with reference to subtitles,³⁴ and to the titles of an initiated measure.³⁵

This is the rule whether the title is regarded a part of the statute or not.³⁶ While in those jurisdictions where the title is not a part of the statute some criticism might be made of this rule, it is undoubtedly a proper rule in those jurisdictions where the title is a part of the statute,³⁷ especially where the constitution requires the subject to be expressed in the title,³⁸ and even though the constitu-

³³ "Where the enacting clause of a statute is clear and unambiguous, the preamble or title will not be permitted to contradict that clear intention as evidenced by the enacting clause; but where there is doubt as to the intent and purpose of a statute and the title or preamble will aid in ascertaining that intent and purpose, courts, under such circumstances, may with propriety make use of the title as a very important guide to its right construction. This rule is accentuated when we consider the mischief and the remedy." *In re American Surety Co.*, 319 Pa. 549, 181 Atl. 364. Also see *U.S. v Mouygas*, 42 Fed. (2) 743. Similarly, in determining the legislative intention, where the act is unambiguous, a title narrower than the act will not be considered as an aid. *Huff v Udey*, 173 Ark. 464, 292 S.W. 863.

³⁴ *Earle v Holman (Ore.)* 61 Pac. (2) 1242; *Tenn. Credit Clearing Co. v Lindsey*, 162 Tenn. 149, 35 S.W. (2) 393.

³⁵ *State v Superior Ct.*, 168 Wash. 361, 12 Pac. (2) 394.

³⁶ *Allen v U.S. (Virgin Is.—C.C.A.)* 47 Fed. (2) 735; *People v Powell*, 280 Mich. 699, 274 N.W. 373, 111 A.L.R. 721; *Simon Ginsberg Realty Co. v Greenstein*, 283 N.Y.S. 100, 157 Misc. 148. And the rule is the same if the law involved is a joint resolution. *Lovett v Ferguson*, 10 S.D. 44, 71 N.W. 765.

³⁷ *Southern Coal Co. v R. & P. Const. Co. (La. Ap.)* 133 So. 491; *Sharp v Producers Produce Co.*, 226 Mo. Ap. 189, 47 S.W. (2) 242; *Addotta v Blunt*, 114 N.J.L. 85, 176 Atl. 105.

³⁸ *Ex parte Knight*, 52 Fla. 144, 41 So. 786; *Oklahoma Gas & Elec. Co. v Oklahoma Tax. Comm. (Okla.)* 58 Pac. (2) 124. "The constitutional mandate that the object of every law shall be expressed in its title, has given the title of an act a twofold effect. It has added additional force to the title as an indication of legislative intent in aid of the construction of a statute couched in language of doubtful import and it also operates as a constitutional limitation upon the enacting part of the law. The enacting part of a statute, however, clearly expressed, can have no effect beyond the object expressed in the title. To maintain any part of such a statute, those portions not embraced within the purview of the title must be excised; and if the super-addition to the declared object cannot be separated and rejected, the entire act must fail." *Dobbins v Northampton Tp.*, 50 N.J.L. 496, 499, 14 Atl. 587, 589. And the title of a special act may be considered, in view of the fact that the subject of a special law must be embraced in its title to preserve its constitutionality. *People v Miller*, 1 N.Y.S. (2) 267, 164 Misc. 726.

tional requirement is simply directory.³⁹

The title, however, is not conclusive of the intent of the legislature but constitutes only one of the numerous sources from which assistance may be obtained in the ascertainment of that intent in cases of doubt.⁴⁰ It is but indicative of the legislative intent.⁴¹ It will not supply defects or omissions in the enacting part, but may be resorted to merely as an aid in the ascertainment of the legislative intent where the meaning is uncertain by reason of the use of general language of indefinite signification, or of words of doubtful import.⁴²

§ 207. Chapter, Article, and Section Headings, and Marginal Notes.—Where the statute is ambiguous, the chapter, article and section headings may also be referred to by the court in ascertaining the intention of the legislature,⁴³ although there is authority to the

³⁹ *Lewis v Simpson* (Miss.) 167 So. 780.

⁴⁰ But where the constitution requires that the statute's title relate to but one subject which must be clearly expressed in the title, the title is entitled to more weight than in those jurisdictions without this constitutional provision. *Coosaw v S.C. ex rel Tillman*, 144 U.S. 550, 12 S.Ct. 689, 36 L.Ed. 537; *Orvis v Bd. of Park Comrs.*, 88 Iowa 674, 56 N.W. 294; *Garrigus v Board of Comrs.*, 39 Ind. 66; *Reithmiller v People*, 44 Mich. 280, 6 N.W. 667; *Glaser v Rothchild*, 221 Mo. 180, 120 S.W. 1; *People v Wood*, 71 N.Y. 371; *Halderman's Appeal*, 104 Pa. 251. This is true since it must be presumed that the legislature gave some thought to the title. However, even with the presence of this sort of a constitutional provision, the title must not be resorted to, unless the statute is of doubtful meaning. See *Garrigus v Board of Comrs.*, 39 Ind. 66.

⁴¹ *Matthews v Strait*, 186 Ark. 384, 53 S.W. (2) 857; *Nangle v Northern Pac. Ry. Co. (Mont.)* 32 Pac. (2) 11.

⁴² *Evernham v Hulet*, 45 N.J.L. 53. It may also corroborate the apparent legislative intent. *Ward v Bd. of Commissioners*, 36 Wyo. 460, 256 Pac. 1039.

⁴³ *Knowlton v Moore*, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969; *Keyes v Cyrus*, 100 Calif. 322, 34 Pac. 722; *People v Lamphier*, 172 N.Y.S. 247, 104 Misc. 622; *Ex parte Tillman*, 84 S.C. 552, 66 S.E. 1049; *State v Johnson*, 24 S.D. 590, 124 N.W. 847; *Jordan v S. Boston*, 138 Va. 838, 122 S.E. 265; *Chambers v Higgins (Va.)* 193 S.E. 531. And see *Southlands Co. v San Diego (Calif.)* 297 Pac. 521, that the headnote of a code may be considered for purposes of interpretation. "But when the body of the act is clear, plain and concise, leaving nothing open to construction, we cannot hold that a head-note, even though enacted by the legislature as a part of the act, should be permitted to cast doubt upon that which is not doubtful, and be made an excuse for construing that which, without it, would require no construction." *State v Crothers*, 118 Wash. 226, 203 Pac. 74.

contrary.⁴⁴ This latter view is, or at least can be based upon the reasoning that, since the headings are inserted by clerks or revisors, who cannot exercise legislative power, to permit reference to them in the interpretation of a statute would be to allow such clerks or revisors to encroach upon the prerogative of the legislature.⁴⁵ This reasoning, however, cannot be applicable where the headings are inserted by the legislators when the bill is drafted or enacted,⁴⁶ or appeared in it when it was enacted,⁴⁷ nor when a code or revision is enacted or adopted by the legislature at one time.⁴⁸ The best argument against permitting consideration of the various headings is that they are inserted for convenience or reference and are not therefore essential parts of the statute.⁴⁹ Furthermore, due to the probability of inaccuracy, in most cases, very little, if any, reliance should be placed upon the headings in order to control the statute's construction.⁵⁰

⁴⁴ *State v Maurer*, 255 Mo. 152, 164 S.W. 551. Also see *People v Fishman*, 119 N.Y.S. 89, 64 Misc. 256; *Dunn v Dunn*, 199 N.C. 535, 155 S.E. 165; *Upham v Bramwell*, 105 Ore. 597, 209 Pac. 100, 210 Pac. 706, 25 A.L.R. 919; *Drake v Yawn* (Tex. Civ. Ap.) 248 S.W. 726.

⁴⁵ *Ibid.* But note *Gully v Jackson International Co.*, 165 Miss. 103, 145 So. 905, that the headings to the various sections were not strictly titles or sub-titles, but lead lines, which are a part of the statute, and hence entitled to consideration.

⁴⁶ See *Griffith v Carter*, 8 Kan. 565; *Earle v Homan* (Ore.) 61 Pac. (2) 1242.

⁴⁷ In re *Derry's Estate*, 291 N.Y.S. 22, 161 Misc. 135. And see *People v Molyneux*, 40 N.Y. 113, 53 Barb. 9: "In this form of enactment such statements are a part of the law itself, and not in any wise extrinsic to the enacting clause. Their office is solely to control, limit and apply, the succeeding provisions of the statute. To reject them, or refuse to give effect to them, according to their fair and ordinary import and understanding, would be to make the law, not to administer it." But note *State v Crothers*, 118 Wash. 226, 203 Pac. 74.

⁴⁸ *Barnes v Jones*, 51 Calif. 303; *People v Molyneux*, 40 N.Y. 113. And the heading under these circumstances is entitled to more consideration than ordinary titles. *State v Lewis*, 142 N.C. 626, 55 S.E. 600.

⁴⁹ *People v Fishman*, 119 N.Y.S. 89, 64 Misc. Rep. 256; *State v Johnson* (S.D.) 124 N.W. 847; *Olson v City of Sioux Falls* (S.D.) 262 N.W. 85; *Chesapeake, etc., R. Co. v Pew*, 109 Va. 288, 64 S.E. 35; *State ex rel Bellingham v Bridges*, 19 Wash. 431, 53 Pac. 545. This is true with reference to revised federal statutes by virtue of statute. *U.S. v Fehrenback*, Fed. Cas. No. 15,083.

⁵⁰ *Battle v Shivers*, 39 Ga. 405; *State v Popp*, 45 Md. 432; *Huff v Alsup*, 64 Mo. 51. Also see *Common. Mut. F. Ins. Co. v Place, et al*, 21 R.I. 248, 43 Atl. 68.

Marginal notes, in a manner similar to headings, may also be considered, if they constitute a part of the original statute⁵¹ but apparently not if they have been inserted for the sake of convenience.⁵²

§ 208. Legislative Definitions and Interpretation Clauses.⁵³—The legislature has the power to embody in the statute itself a definition of its language⁵⁴ as well as rules for its construction.⁵⁵ These are usually binding upon the courts, since they form a part of the

⁵¹ *Bettencourt v Sheehy*, 157 Calif. 698, 109 Pac. 89; *Mason v Cranbury Township*, 68 N.J.L. 149, 52 Atl. 568; *Earle v Homan (Ore.)* 61 Pac. (2) 1242. Also see *In re Miranda's Will*, 271 N.Y.S. 913, 151 Misc. 459. That the notes of commissioners may be resorted to, see *In re Garry's Estate*, 270 N.Y. 514, 200 N.E. 296.

⁵² *Board of School Comrs. v Am. Surety Co.*, 220 Ala. 458, 125 So. 906; *Cook v Federal Life Assoc.*, 74 Iowa 746, 35 N.W. 500; *State v Erickson*, 159 Minn. 287, 198 N.W. 1000; *People v Hartwell*, 166 N.Y. 361, 59 N.E. 929; *Commonwealth Mut. F. Ins. Co. v Place*, 21 R.I. 248, 43 Atl. 68. But note *Mackey v Miller*, 126 Fed. 161, and *Lasseter v O'Neill*, 162 Ga. 826, 135 S.E. 78, 49 A.L.R. 1076.

⁵³ For definition and further discussion of Interpretation Clauses, see *supra*, § 92. For propriety in resorting to interpretation clauses as extrinsic aids to construction, see § 223, *infra*.

⁵⁴ *Collins v Texas*, 233 U.S. 288, 32 S.Ct. 286, 56 L.Ed. 439; *Clay v Central R. Co.*, 84 Ga. 345, 10 S.E. 967; *State v Schlenker*, 112 Iowa 642, 84 N.W. 698, 51 A.L.R. 347; *Herold v State*, 21 Neb. 50, 31 N.W. 258; *City of St. Louis v Nash*, 266 Mo. 523, 181 S.W. 1145; *Olson v Sioux Falls*, 63 S.D. 563, 262 N.W. 85; *Rossmiller v State*, 114 Wis. 169, 89 N.W. 839, 58 L.R.A. 93. Also see cases in note 55, *infra*.

⁵⁵ *People v Bowman*, 247 Ill. 276, 93 N.E. 244; *State v Grange*, 200 Ind. 506, 165 N.E. 239; *Schultz v Parker*, 158 Iowa 42, 139 N.W. 173; *Montgomery County Motor Co. v State*, 147 Md. 232, 127 Atl. 637; *James v City of Newberg*, 101 Ore. 616, 201 Pac. 212. Also see cases under note 54, *supra*. And note *Sicherman Construction of Clause in Uniform State Laws providing for Uniformity of Interpretation* (1916) 2 A.B.A. J. 60, and note (1915) 29 Harv. L.Rev. 541.

statute,⁵⁶ even though in the absence of such a definition or rule of construction, the language would convey a different meaning.⁵⁷ But the meaning of the legislature, as revealed by the statute considered in its entirety, if contrary to the expressions of the interpretation clause or the legislative definitions, will prevail over them.⁵⁸ That is, the interpretation clause will control in the absence of anything else in the act opposing the interpretation fixed by the clause.⁵⁹ Nor should the interpretation clause be given any wider meaning than is absolutely necessary.⁶⁰ In other words, it should be subjected to a strict construction.

⁵⁶ *People v Bowman*, 247 Ill. 276, 93 N.E. 244; *Bettenbrock v Miller*, 185 Ind. 600, 112 N.E. 771; *Cambridge v Boston*, 130 Mass. 357; *Byrd v State*, 57 Miss. 243; *Nebraska Loan, etc., Assoc. v Perkins*, 61 Neb. 254, 85 N.W. 67; *State Assessors v Plainfield Water, etc., Co.*, 67 N.J.L. 357, 52 Atl. 230; *James v Newberg*, 101 Ore. 616, 201 Pac. 212; *Getz v Brubaker*, 25 Pa. Super. 303; *Philadelphia, etc., R. Co. v Catawissa R. Co.*, 53 Pa. 30; *Stephens County v Hefner*, 118 Tex. 397, 16 S.W. (2) 804; *Rossmiller v State*, 114 Wis. 169, 89 N.W. 839, 58 L.R.A. 93. The legislature does "have power to describe legal definitions of its own language, and when an act passed by it embodies a definition, it is binding on the courts. Even declaratory statutes are entitled to respectful consideration by the courts, although not always binding." *State v Schlenker*, 112 Iowa 642, 84 N.W. 698, 51 L.R.A. 347.

⁵⁷ *Smith v State*, 28 Ind. 321; *Arnett v State*, 168 Ind. 180, 80 N.E. 153; *Jones v Surprise*, 64 N.H. 243, 9 Atl. 384; *Snyder v Compton*, 87 Tex. 374, 28 S.W. 1061. Also see *State v Grange*, 200 Ind. 506, 165 N.E. 239, and *Mathison v Brister*, 166 Miss. 67, 145 So. 358.

⁵⁸ *Ryan v State (Ind.)* 92 N.E. 340; *Egerton v Third Municipality of New Orleans*, 1 La. Ann. 435; *Von Weise v Comm. Int. Rev.*, 69 Fed. (2) 439.

⁵⁹ *In re Bronson's Estate*, 150 N.Y. 1, 44 N.E. 707, 34 L.R.A. 238. In this connection also see, *Ivey v Railway Fuel Co.*, 218 Ala. 407, 118 So. 583, involving a legislative definition of the word "minor" in a compensation act, where the court announced the rule that defining clauses should be used only for the purpose of interpreting words that are ambiguous or equivocal and not so as to disturb the meaning of such words as are plain. And to same substantial effect, see *O'Brien v Manchester*, 84 N.H. 492, 152 Atl. 720.

⁶⁰ See *Wilberforce, Stat. Law*. 296. Also note *State v Adams*, 51 N.H. 568, where it was held that in an indictment, the meaning of language depends on popular usage, which is not, and cannot, unless in a very slight degree, be affected by a legislative definition. For criticism of interpretation clauses, see *Ely v Bliss (Eng.)* 2 DeG., M & G 459, 471.

Pursuant to the aforesaid rules, the statutory definition of the words "itinerant merchant" in a statute imposing a tax on those who followed this occupation, controlled as against all other definitions.⁶¹ And it was held clearly within the power of the legislature to define the expression "executive departments" of government as used in a statute relative to public printing, even though the definition was not the usual one.⁶²

It is not particularly difficult to see how important a statutory definition or interpretation clause may be in the interpretation of a statute. Perhaps from the context of a statute, it may not appear that a word of common usage is intended to bear a peculiar or special meaning. Perhaps in the construction of a particular act, the legislature wishes to substitute the ordinary rule of strict construction for that of liberal construction. No better source from which the court could obtain a true indication of the legislative intent exists than in the legislative definition or interpretation clause.

Although the legislative definition may be of great assistance in clearly revealing the legislative meaning, it may also create considerable confusion. The definitive language may itself require construction. Its own language may be ambiguous. It may be clearly contradictory with the language of the statute proper. The statute may indicate that the legislative definition is inaccurate. It is, therefore, obvious that before the legislative definition can be relied upon, its applicability as well as its reliability should be ascertained. And in this connection, one important situation should be mentioned. In the event that the definition found in the interpretation clause is at variance with the intention of the lawmakers as expressed in the plain language of the statute, that intention must prevail over the legislative definition.⁶³ In other words, the intent of the legislature

⁶¹ *Greenleaf & Crosley Co. v Coleman*, 117 Fla. 723, 158 So. 421.

⁶² *State ex rel McKinley Publishing Co. v Hackmann*, 314 Mo. 33, 282 S.W. 1007.

⁶³ See note 58, *supra*.

⁶⁴ See *Ryan v State (Ind.)* 92 N.E. 340, and *Egerton v Third Municipality*, 1 La. Ann. 435.

must control the legislative definition.⁶⁴ But the interpretation clause and the statute proper must all be construed together as a part of the same statute. Where this is done, if the definition laid down by the legislature does not conflict with the intent of the legislature, then the former may be given effect. If the two can be harmonized, there can be no objection to allowing the interpretation clause to control the language defined. To give the interpretation clause precedence where the two cannot be harmonized, would operate to make the ancillary portion of the statute superior to the primary portion. The statute's meaning would in all probability be distorted, and the legislative intent defeated.

CHAPTER XXI

EXTRINSIC AIDS IN THE INTERPRETATION AND CONSTRUCTION OF STATUTES

- § 209. In General.
- § 210. Contemporaneous Circumstances.
- § 211. The Principle Applied.
- § 212. Public Policy.
- § 213. The Motives and Opinions of the Legislature and Its Members.
- § 214. Some Representative Views.
- § 215. Committee Reports and Legislative Debates as Aids in Interpretation Distinguished.
- § 216. History of the Statute.
- § 217. The Principle Illustrated.
- § 218. Contemporaneous Construction and Usage, Generally.
- § 219. Executive Construction.
- § 220. Some Illustrative Cases.
- § 221. Construction by the Executive Department Analyzed.
- § 222. Construction by the Bar.
- § 223. Legislative Construction.
- § 224. Judicial Construction.
- § 225. Proof and Evidence of Extrinsic Aids.
- § 226. Some Illustrative Cases.

§ 209. In General. — After all intrinsic aids have been exhausted, if the meaning of the statute is still in doubt, certain extrinsic matters may be considered by the court in its effort to ascertain the statute's meaning.¹ But the statute must be ambiguous before a resort to extrinsic evidence is justified.² Such extra-

¹ *Lapina v Williams*, 232 U.S. 78, 34 S.Ct. 196, 58 L.Ed. 515; *Gardner v The Collector*, 6 Wall. (U.S.) 499, 18 L.Ed. 890; *Schultz v Ohio County*, 226 Ky. 633, 11 S.W. (2) 702; *Maryland Agric. College v Atkinson*, 102 Md. 557, 62 Atl. 1035; *Millspaugh v Kesterson*, 307 Mo. 185, 270 S.W. 110; *O'Brien v Rockingham County*, 80 N.H. 522, 120 Atl. 254; *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829; *Fortune v Buncombe County*, 140 N.C. 322, 52 S.E. 950; *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883; *U.S. Fidelity & Guar. Co. v Bramwell*, 108 Ore. 261, 217 Pac. 332, 32 A.L.R. 829; *Bd. of Educ. v Bryner*, 57 Utah 78, 192 Pac. 627; *State v Hamilton*, 92 Wash. 347, 159 Pac. 379; *Pfingsten v Pfingsten*, 164 Wis. 308, 159 N.W. 921.

² *Waters v State*, 25 Ala. Ap. 144, 142 So. 113; *In re Sloan's Estate* (Calif. Ap.) 46 Pac. (2) 1007. Also note *Gardner v The Collector* (U.S.) 6 Wall. 499, 18 L.Ed. 890.

neous matters, as is obvious, will be entitled to various degrees of weight, depending upon their reliability, and the closeness of their connection with the statute itself.³ And even where all doubt regarding the meaning of a statute has been removed by resort to intrinsic matters, extraneous matters may and should be set forth as additional reasons for the adoption of the construction reached by the court.⁴

It is the purpose of this chapter to discuss the numerous extrinsic aids which may be used in ascertaining the intention of the legislature. However, at this point, before proceeding to discuss the various extrinsic aids specifically, the highly pertinent inquiry might be made: If the language of the statute constitutes the reservoir of the legislative intent, and all the cases recognize that it does, why should resort to extraneous matters be permissible? The court, however, resorts to these extrinsic matters, not as reservoirs of the legislative intent, but merely as indications or evidence of such intent. Such matters simply operate to reveal or to explain the language used by the legislature in the legislative enactment. If these extraneous matters were a part of, or even the reservoir of the intent of the legislature, then in every case the court would have to resort to them for that intent, and the intent there discovered would control that indicated by the language of the statute. Such a view would often make the discovery of the legislative intent impossible, since many of the permissible extrinsic aids are difficult to establish and are often, so far as certain statutes are concerned, non-existent. Consequently, these extraneous matters merely occupy the status of aids in the ascertainment of the legislative intent, or as corroborating indicia of that intent.

§ 210. Contemporaneous Circumstances. — When it becomes necessary to resort to extraneous matters in order to ascertain the meaning of a statute, the court may properly refer to what is gener-

³ *Gardner v The Collector*, 6 Wall. (U.S.) 499, 18 L.Ed. 890.

⁴ *Boston Sand & Gravel Co. v U.S.*, 278 U.S. 41, 73 L.Ed. 170, 49 S.Ct. 52, aff. 19 Fed. (2) 744, and mod. 16 Fed. (2) 643. Also see § 175, *supra*.

ally known as contemporaneous circumstances.⁵ Such circumstances include the history of the times existing when the law was enacted,⁶ the previous state of the law,⁷ the evils intended to be cor-

⁵ U.S. v Wooten, 40 Fed. (2) 882; Breashears v Norman, 2 S.W. (2) 53, 176 Ark. 26; People v Day, 321 Ill. 552, 152 N.E. 495; State v Claiborne, 185 Iowa 170, 170 N.W. 417, 3 A.L.R. 392; Central Trust Co. v Howard (Mass.) 175 N.E. 461; State v Eckhardt, 232 Mo. 49, 133 S.W. 321; In re Hamlin, 226 N.Y. 407, 124 N.E. 4, 7 A.L.R. 701; Hunt v Eure, 188 N.C. 716, 125 S.E. 484; Baker v Latses, 60 Utah 38, 206 Pac. 553. An excellent treatment of this aid to statutory construction may be found in First Trust Co. v Smith (Neb.) 277 N.W. 762, involving a mortgage moratorium law.

⁶ U.S. v Union Pac. R. Co., 91 U.S. 72, 23 L.Ed. 224; Henry v McCormack Bros. (Ala.) 167 So. 256; Jerome H. Scheip Co. v Amos (Fla.) 130 So. 699; Dibble v Winter, 247 Ill. 243, 93 N.E. 145; Hyland v Rochelle, 179 Ind. 671, 100 N.E. 842; State v Kelly, 71 Kan. 811, 40 L.R.A. 450; Shultz v Ohio County, 226 Ky. 633, 11 S.W. (2) 702; State v Nichols, 30 La. Ann. 980; In re Opinion of Justices, 254 Mass. 617, 151 N.E. 680; State v Forest, 177 Mo. Ap. 245, 162 S.W. 706; Sullivan v Butte, 65 Mont. 495, 211 Pac. 301; Neb. Dist. of Evangelical Lutheran Synod v McKelvie, 104 Neb. 93, 175 N.W. 531; In re Hamlin, 226 N.Y. 407, 124 N.E. 4, 7 A.L.R. 701; Baird v Burke County, 53 N.D. 140, 205 N.W. 17; Chicago, etc., R. Co. v Gist, 79 Okla. 8, 190 Pac. 159; Superior Oil Co. v Handley, 99 Ore. 146, 195 Pac. 159; Crescent Mfg. Co. v Tax Comm., 129 S.C. 480, 124 S.E. 761; Trotter v State, 12 S.W. (2) 951, 158 Tenn. 264; Cousins v Sovereign Camp. (Tex.) 35 S.W. (2) 696; Nell v Utah Wholesale Groc. Co., 61 Utah 22, 210 Pac. 201, err. dis. 265 U.S. 572, 68 L.Ed. 1185, 44 S.Ct. 458; Daniel v Simms, 49 W.Va. 554, 39 S.E. 690.

⁷ In re Martin, 283 Fed. 833; Southern Express Co. v Brickman Co., 187 Ala. 637, 65 So. 954; Arnold v Hopkins, 203 Calif. 553, 265 Pac. 223; Old Saybrook v Public Util. Comm., 100 Conn. 322, 124 Atl. 33; People v Day, 321 Ill. 552, 152 N.E. 495; Haynes Automobile Co. v Kokomo, 186 Ind. 9, 114 N.E. 758; Latta v Utterback, 202 Iowa 1116, 211 N.W. 503; Schultz v Ohio County, 226 Ky. 633, 11 S.W. (2) 702; National Fire Ins. Co. v Goggin, 267 Mass. 430, 166 N.E. 758; State v McQuillan, 246 Mo. 517, 152 S.W. 347; Wyatt v State Bd., 74 N.H. 552, 70 Atl. 387; Matter of Clark, 168 N.Y. 427, 61 N.E. 769; Kraus v Philadelphia, 265 Pa. 425, 109 Atl. 226; Crescent Mfg. Co. v Tax Comm., 129 S.C. 480, 124 S.E. 761; State v Polley, 30 S.D. 528, 139 N.W. 118; Cameron v City of Waco (Tex. Civ. Ap.) 8 S.W. (2) 249; Sorrell v White, 103 Vt. 277, 153 Atl. 359; State v Stewart, 52 Wash. 61, 100 Pac. 153.

rected,⁸ and even, according to some cases, the habits and activities of the people.⁹ Generally, these circumstances may be defined as the conditions under which the statute was enacted.¹⁰ And the court may inform itself as to these circumstances by any and all available means.¹¹ The various extraneous considerations, however, are not to be resorted to in order to alter the meaning of the statute, but to remove whatever doubt that still remains after all intrinsic aids have been considered.

But it is not clear whether the circumstances to be considered are limited to those known to the legislature.¹² It is submitted, however, that consideration should not be thus limited. Circumstances concerning which the legislators have no knowledge may, and undoubtedly do, play an important role in the history of any important piece of legislation. Usually, laws of great general importance come about as the result of long periods of agitation. Frequently, it is possible that the first cause of the agitation may be lost sight of by

⁸ *Trinity Church v U.S.*, 143 U.S. 457, 36 L.Ed. 226, 16 S.Ct. 666; *Richardson Lumber Co. v Howell*, 219 Ala. 328, 122 So. 343; *Fairfield v Foster*, 25 Ariz. 146, 214 Pac. 319; *Hays v McDaniel*, 130 Ark. 52, 196 S.W. 934; *National Surety Co. v Schafer*, 57 Colo. 56, 140 Pac. 199; *DiBiase v Garnsey*, 103 Conn. 21, 130 Atl. 81; *State v Grier*, 27 Dela. 322, 88 Atl. 579; *McCamy v Payne*, 94 Fla. 210, 113 So. 712, 94 Fla. 209, 116 So. 267; *Peabody v Russel*, 301 Ill. 439, 161 N.E. 519; *Haynes Auto Co. v Kokomo*, 186 Ind. 9, 114 N.E. 758; *Curtis v Michaelson*, 206 Iowa 111, 219 N.W. 49; *Common. v Barnett*, 196 Ky. 731, 245 S.W. 874; *State v Maloney*, 115 La. 498, 39 So. 539; *Pelletier v O'Connell*, 111 Me. 38, 88 Atl. 55; *Nat. Fire Ins. Co. v Goggin*, 267 Mass. 430, 166 N.E. 758; *Mushel v Schultz*, 139 Minn. 234, 166 N.W. 179; *Hammer v Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466; *Boll v Condie-Bray Glass & Paint Co.*, 321 Mo. 92, 11 S.W. (2) 48; *State v Tullock*, 72 Mont. 482, 234 Pac. 277; *Clough v Clough*, 80 N.H. 462, 119 Atl. 327; *Holt v Akarman*, 84 N.J.L. 371, 86 Atl. 408; *Archer v Equit. Life Assur. Soc.*, 218 N.Y. 18, 112 N.E. 433; *Hunt v Eure*, 188 N.C. 716, 125 S.E. 484; *Baird v Burke County*, 53 N.D. 140, 205 N.W. 17; *DeHasque v Atchison, etc., R. Co.*, 68 Okla. 183, 173 Pac. 73; *Kraus v Philadelphia*, 265 Pa. 425, 109 Atl. 226; *First Nat. Bank v Howard*, 148 Tenn. 188, 253 S.W. 961; *Enoch v Common.*, 141 Va. 411, 126 S.E. 222; *Huntworth v Tanner*, 87 Wash. 670, 152 Pac. 523; *Foster v Sawyer County*, 197 Wis. 218, 221 N.W. 768.

⁹ *Schultz v Ohio County*, 226 Ky. 633, 11 S.W. (2) 702; *Cousins v Sovereign Camp. (Tex.)* 35 S.W. (2) 696; *Higgins v Rinker*, 47 Tex. 393. For discussion of the construction of statutes by trade usage, see (1923) 39 Harv. L.Rev. 122. Also see *West Boylston Mfg. Co. v Board of Assessors*, 277 Mass. 180, 178 N.E. 531, that commercial usage may be considered. As a result of the application of this rule, "a person qualified to vote for representatives to the general court shall be liable to serve as a juror,"

the time the law is enacted. Various hidden facts may and undoubtedly do influence the enactment of legislation.

The question naturally arises: why should contemporaneous circumstances shed any light upon the legislative intent? The answer is obvious. As will be seen from the illustrations in the succeeding section, these circumstances constitute the reasons why the statute was enacted. They are a part of the *res gestae*. Moreover, it must be assumed that the legislature intended to correct the evils which led to the law's enactment. It is logical to assume, in a democracy, that the needs and the desires of the people will find expression in the enactments of legislatures consisting of representatives of the people. If this were not so, then there would be little, if any, justification for resorting to the circumstances surrounding the enactment of a law in an effort to ascertain the legislative intent. At least, many of the circumstances would be clearly irrelevant.

did not include women:—"The words of a statute are the main source for the ascertainment of a legislative purpose. They are to be construed according to their natural import in common and approved usage. The imperfections of language to express intent often render necessary further inquiry. Statutes are to be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are a part; and in the light of the constitution and the common law, to the end that they be held to cover the subjects presumed within the vision of the legislature, and, on the one hand, be not unduly constricted so as to exclude matters fairly within their scope, and, on the other hand, be not stretched by enlargement of signification to comprehend matters not within the principle and purview on which they were founded when originally framed and their words chosen. General expressions may be restrained by relevant circumstances showing a legislative intent that they be narrowed and used in a particular sense."

¹⁰ *Pate v Ross* (Mo. Ap.) 84 S.W. (2) 961; *Skinner v State ex rel Laacke* (Wis.) 261 N.W. 880.

¹¹ *Lake v Parish of Caddo*, 37 La. Ann. 788. Also see § 213, *infra*.

¹² *State v Harden*, 62 W.Va. 313, 58 S.E. 715, 60 S.E. 394. Also see *Conn. v Hurley*, 124 Conn. 20, 197 Atl. 90, that resort may be had to "the circumstances . . . known to the legislature at the time of its enactment," and *West v Sun Cab Co.* (Md.) 154 Atl. 100, that "while it is the province of the courts and not the legislature, to interpret the law, the courts are not shut off from any available discussion or sources of information available to the legislature in order to ascertain the legislative intent."

§ 211. **The Principle Applied.**—In *General Broadcasting System v Bridgeport Broadcasting Station* (53 Fed. (2) 664, 667), we find the following application of the general rule:

“It is a well established rule of statutory construction that, to determine the legislative intent, the court may take into consideration the conditions existing at the time the legislation in question, upon which legislation was intended to operate. It is well known that in 1927 the condition of the radio broadcasting industry was chaotic, in view of the multiplicity of broadcasting stations which had sprung into being and the lack of regulatory authority to prevent disastrous interference. To relieve the tortured state of the ether, it was imperative that regulation, above all, should be prompt. A decision of the Radio Commission, subject to stay pending appeal, would have been a form of regulation lacking the promptness required by the exigencies of the situation. The very history of this case illustrates that point.”

We also find a representative application of the general rule in *Pate v Ross* (229 Mo.Ap. 836, 84 S.W. (2) 961) where a statute was involved which provided for the remission of penalties accrued upon delinquent taxes, and such statute was held applicable to delinquent drainage taxes and to preclude the collection of attorney's fees in an action therefor, since the purpose of the statute was to relieve persons whose taxes had become delinquent:

“The title clearly indicates the primary legislative intent to be for the relief of all persons whose personal or real estate taxes had become delinquent on or before January 1, 1933. What were the conditions at the time the act was enacted? It is well known that many taxpayers were in financial distress (and for that matter still are). On all sides were cries for relief from the situation in which our people found themselves. The legislature apparently heeded those cries and enacted the law under consideration as well as other relief legislation.”

The application of the rule may also be found in *State ex rel Coleman v Kelly* (71 Kan. 811, 81 Pac. 450, 70 L.R.A. 450):

“Statutes are but public sentiments enacted into laws, and frequently the policy of such legislation is the subject of much public discussion, both before and at the time of its enactment. In construing it courts may not shut their eyes to these public discussions. They are proper matters of consideration in determining the legislative intent, and should be considered for that purpose in the construction of an act growing out of such discussion.

In common with all other well-informed persons this court knows of the great quantities of crude oil that were discovered in a part of the state; the rapid development of this field of industry; the general public complaint that a particular corporation was unjustly manipulating the market of this product so that the producer was being deprived of what rightfully belonged to him; that a public demand was made upon the legislature of 1905 to enact some law which would protect the producer from the further encroachment of the corporation upon his rights."

§ 212. **Public Policy.**¹³—In spite of authority to the contrary,¹⁴ the general policy of the state,¹⁵ or the established policy of the legislature as revealed by its legislation generally,¹⁶ should be considered in the construction of statutes. The view opposed to this principle is based upon the premise that public policy is too unstable

¹³ For further discussion, see Freund, *Interpretation of Statutes*, 65 Pa. L.Rev. 207 (1917).

¹⁴ *Hadden v The Collector*, 5 Wall. (U.S.) 107, 18 L.Ed. 518; *Jewell v City of Ithaca*, 73 N.Y.S. 593, 36 Misc. R. 499.

¹⁵ *Ozawa v U.S.*, 260 U.S. 178, 43 S.Ct. 65, 67 L.Ed. 199; *Allgood v State*, 20 Ala. Ap. 665, 104 So. 847, cert. granted, 104 So. 851, 213 Ala. 426; *Stockton Plumbing Co. v Wheeler*, 68 Calif. Ap. 592, 229 Pac. 1020; *DiBiase v Garnsey*, 103 Conn. 21, 130 Atl. 81; *State v Bartels*, 191 Iowa 1060, 181 N.W. 508; *Shultz v Ohio County*, 226 Ky. 633, 11 S.W. (2) 702; *Opinion of Justices*, 7 Mass. 523; *Williams v St. Louis, etc., Ry. Co. (Mo. Ap.)* 7 S.W. (2) 392; *Conover v Public Service Co.*, 80 N.J.L. 681, 78 Atl. 187; *Carey v Cruise*, 246 N.Y. 237, 158 N.E. 315; *Baxter v Tripp*, 12 R.I. 310; *Crescent Mfg. Co. v Tax. Comm.*, 129 S.C. 480, 124 S.E. 761; *State v Temple*, 142 Tenn. 466, 220 S.W. 1084; *Freels v Walker*, (Tex. Com. Ap.) 26 S.W. (2) 627, reh. den., 35 S.W. (2) 408; *State v Kelly*, 71 Kan. 811, 81 Pac. 450; *Bayonne Textile Corp. v Am. Fed. of Silk Workers*, 116 N.J. Eq. 146, 172 Atl. 551, 92 A.L.R. 1450. "In construing statutes, it is helpful to ascertain the general policy of the state regarding the subject." *State v Bartels*, 191 Iowa 1060, 181 N.W. 508.

¹⁶ *U.S. v Sweet*, 245 U.S. 563, 62 L. Ed. 473, 38 S.Ct. 193; *Griswold v Griswold*, 23 Colo. Ap. 365, 129 Pac. 560; *Hastings v Rathbone*, 194 Iowa 177, 188 N.W. 960, 23 A.L.R. 392; *Common. v Vanmeter*, 187 Ky. 807, 221 S.W. 211; *Middleton v Lincoln County*, 122 Miss. 673, 84 So. 907; *Christie Lithograph, etc., Co. v Hamblin (Mo. Ap.)* 144 S.W. 882; *State v Sedgwick*, 46 Mont. 187, 127 Pac. 94; *Mulhall v Nashua Mfg. Co.*, 80 N.H. 194, 115 Atl. 449; *Matter of McGraw*, 111 N.Y. 108, 19 N.E. 233, 2 L.R.A. 387; *Hibbett v Pruitt*, 162 Tenn. 285, 36 S.W. (2) 897; *Austin v Cahill*, 99 Tex. 172, 88 S.W. 542. But public policy cannot create an exception when the language is plain and all comprehensive. *In re Morse*, 247 N.Y. 290, 160 N.E. 374.

a ground upon which to rely in the interpretation of statutes.¹⁷ While this argument carries considerable weight, and although it be admitted that public policy should not be a controlling consideration or perhaps entitled to great weight,¹⁸ where doubt exists regarding the meaning of a statute,¹⁹ rather than to allow a miscarriage of the intention of the legislature when that intention is in fact ascertainable, it would seem proper for the court to give the general policy of the state some consideration. Nevertheless, if the legislature reveals an intent to depart from existing public policy, that intent must be made effective;²⁰ the court should not ignore or override it. In other words, the general policy of the state should not be used as an excuse for deviating from or for ignoring the intention of the legislature as expressed or revealed in a specific statute.

Perhaps the proper sphere of public policy in the interpretative process, will appear from a consideration of a few typical cases. Thus, in *Gilbert v Craddock* (67 Kan. 346, 72 Pac. 869), where the question arose whether a provision of the law had been repealed by implication through the passage of a subsequent act, the court resorted to the prior law in an attempt to ascertain the legislative policy, and declared:

¹⁷ *Hadden v The Collector*, 5 Wall. (U.S.) 108, 18 L.Ed. 518. Questions of public policy are for the determination of the legislature rather than the courts. *McCrary v U.S.*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78; *State v Womble*, 112 N.C. 862, 17 S.E. 491, 19 L.R.A. 827; *Tilly v Mitchel & Lewis Co.*, 121 Wis. 1, 98 N.W. 969.

¹⁸ *Fullinwider v Southern Pac. R. Co.*, 248 U.S. 409, 39 S.Ct. 130, 63 L.Ed. 331; *Fergus Motor Co. v Sorenson*, 73 Mont. 122, 235 Pac. 422; *State v Parmenter*, 50 Wash. 164, 96 Pac. 1047. But note *Coulter v Robertson*, 24 Miss. 278.

¹⁹ *Nashville, etc., R. Co. v Marshall County*, 161 Tenn. 236, 30 S.W. (2) 268. Indeed, there is a presumption that the legislature does not intend to enact any legislation in contravention of existing public policy. See *Opinion of Justices*, 7 Mass. 523; also see *Church of the Holy Trinity v U.S.*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226. And such a policy will not be considered abrogated any further than is absolutely required by the language of the new legislation. *Murdock v Memphis* (U.S.) 20 Wall. 590, 22 L.Ed. 429.

²⁰ *Opinion of Justices*, 7 Mass. 523. And the established public policy will not be considered disregarded by the legislature, unless so indicated by clear evidence. *Common. v Peterson*, 13 Pa. Dist. & Co. 673. Also see Note: 5 L.R.A. 340. The same is equally true with reference to a departure from a legislative policy. *Murdock v Memphis*, 20 Wall. (U.S.) 590, 22 L.Ed. 429; *Clough v Boston, etc., R. Co.*, 77 N.H. 222, 90 Atl. 863; *Twentieth St. Bank v Jacobs*, 74 W.Va. 525, 82 S.E. 320.

“To be sure, the implication must be a necessary one. It may be drawn from public policy; past acts; the entire terms, purposes and scope of the act to be considered; the inconvenience, inconsistencies and absurdities involved in the contrary consideration—indeed, from all things found in the act, the conditions surrounding it, the history antedating it, the purposes to be accomplished by it, and the policy dictating it.”

Similarly, in *Bayonne Textile Corporation v Silk Workers* (116 N.J.Eq. 146, 172 Atl. 551), where the construction of the National Industrial Recovery Act was involved, the court relied upon the public policy of the state:

“Labor unions, when instituted for mutual help and co-operation, and the attainment of legitimate ends are lawful. They are a necessary part of the social structure. They are a vital force in our industrial system, and essential for the advancement of the public welfare. The economic independence and security of labor are vital for the public order and welfare. As we have quite recently pointed out, it has long been regarded as a proper function of the state to foster the welfare and safeguard the interests of wage earners. Economic and other considerations underlie this long established state policy. . . . This right, therefore, apart from its constitutional basis, is firmly imbedded in what has long been regarded as sound public policy in treating with labor. And it is a well-established rule that, for the purpose of determining the meaning, but not the validity of a statute, recourse may be had to considerations of public policy. While the statute is designed to cope with the existent national emergency, said to be ‘productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce’ a purpose to disregard sound public policy must not be attributed to the law-making power, except upon the most cogent evidence. The natural import of the words employed in the statute, according to their common use, when applied to the subject matter of the act, is to be considered as expressing the intention of the law-making body, unless the intention so resulting from the ordinary import of the words, be repugnant to sound acknowledged principles of national policy. And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained so that it may comport with those principles, unless the legislative intention be clearly and manifestly repugnant to them. There should be no greater modification of or departure from the firmly established policy than the statute expressly declares. ‘It is not lightly to be assumed that Congress intended to depart from a long-established policy’.”

The court also, in *Reiter v Chapman* (177 Wash. 392, 31 Pac. (2) 1005, 7), gave public policy controlling force:

“While it is true that the courts may not amend a statute by adding words which do not appear therein, still when a legislative policy clearly appears, in appropriate cases, that policy will be considered in construing statutes presented for judicial interpretation.

The principle of giving notice of proposed public contracts is, broadly speaking, in the public interest, and when the legislative authority has indicated, as has that of this state, that it has adopted the general policy of requiring that notice be given of proposed public contracts, the courts will not, by strict construction, narrow the scope of a statute and limit its application in cases where such a construction is apparently against the legislative policy.”

In like manner, the policy of the state was regarded of high importance in *In re Taylor's Will* (55 Ill. 252), where the court, in construing the statute of descents and distributions, held that where a husband makes a will, but makes no devise or bequest to his wife, his estate, as to her, is intestate to the extent of her legal claims, and that under the law it is not in the power of the husband to dispose of his estate as to deprive his widow of the third of the personal property remaining after the payment of his debts, and that there is one-third of the realty beyond his disposal by will, unless a devise or bequest to the wife be made therein, which she is willing to and does accept. The court in reviewing the history of the statute in question in its attempt to locate the policy of the law said:

“These references comprise all the legislation upon this subject, from the earliest foundation of civil government north-west of the river Ohio, to the present time, and manifest, we think, an eager desire on the part of the lawmakers to provide some support for the wife, in the event of her surviving her husband.”

Undoubtedly, so far as most of our important legislation is concerned, a rather definite legislative policy extending over a period of years is discernible. Once that public or legislative policy has

been identified, it can obviously lend considerable assistance toward discovering the meaning of a given statute. If over the period of time considered, there appears to be a legislative effort to achieve a certain goal or end, a construction of the statute in the light of that end or purpose will surely tend to reveal the legislative intent where it is in doubt. It is logical to assume that the new legislation has been enacted as a continuation of the existing legislative policy or as a new effort to perpetuate it or further advance it.

In most instances, the danger in relying on public policy as an aid in the interpretation of statutes, will be found to exist in the difficulty connected with its identification. Even though such a policy exists, the task of discovering what it is, will usually be quite tedious. One may actually be mistaken in its identity. Then, too, the legislative policy may frequently change. But when the court is certain of the legislative policy, no real reason can be urged against its use as an aid in the interpretative process. Indeed, if the court should refuse or fail to utilize this aid under these circumstances, to that extent it fails to exhaust every possible source of assistance. And any suggested interpretation which is in harmony with the state's public policy has a strong claim as representing the legislative intention.

§ 213. The Motives and Opinions of the Legislature and Its Members.²¹—Although there seems to be considerable conflict in the cases, the weight of authority apparently refuses to regard the opinions, the motives, and the reasons expressed by the individual members of the legislature, even in debate, as a proper source from

²¹Also see § 215, *infra*. Views of legislative committee members, *Litchfield v City of Bridgeport*, 103 Conn. 565, 131 Atl. 560, (Contra: *Ex parte Farley*, 40 Fed. 66), or third persons; *Manning v Atlantic, etc., R. Co.*, 188 N.C. 648, 125 S.E. 555, should not be considered in the interpretation of statutes.

which to ascertain the meaning of an enactment.²² The reason assigned for this attitude is that it is often impossible to discover a legislator's opinion.²³ Many legislators will be found to have made no statement whatsoever regarding the statute.²⁴ Hence, these legislators would have to be called as witnesses in order to ascertain what they thought at the time the law was enacted.^{24a} And yet there

²² *Standard Oil Co. v U.S.*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; *McCaughn v Hershey Chocolate Co.*, 283 U.S. 643, 75 L.Ed. 1183, 51 S.Ct. 510; *Commr. Inter. Revenue v Adams*, 54 Fed. (2) 228; *State v Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348; *Ex parte Goodrich*, 160 Calif. 410, 117 Pac. 451; *Stewart v Atlantic Beef Co.*, 93 Ga. 12, 18 S.E. 981; *Tennant v Kuhlemeier*, 142 Iowa 241, 120 N.W. 689; *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829; *State v Partlow*, 91 N.C. 550; *Plunkett v Old Colony Trust Co.*, 233 Mass. 471, 124 N.E. 265, 7 A.L.R. 696. ". . . we now go, not to the legislature, but to the language of the statutes they enact for the public, and governed by certain established and binding rules of construction, we, from that, declare the legislative intention." *Spencer v State*, 5 Ind. 41, 48. But note *Haskell v Perkins*, 28 Fed. (2) 222, where opinions of legislators in charge of a bill were considered. Also see *Standard Oil Co. v U.S.*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, that although the debates of the legislature may not be referred to as a means of interpreting a statute, they may be resorted to in order to ascertain the history of the time the statute was enacted. In *Moyer v Gross (Pa.)* 2 Pen. & W. 171, the opinion of the judge, who was a member of the legislature at the time the statute was enacted, was considered. Also the statements of the author of the bill as to its interpretation may be considered by the court. *U.S. v Rehwald*, 44 Fed. (2) 663.

²³ *U.S. v Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; *State v Lancashire F. Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348; *Tellevast v Kaminski*, 146 S.C. 225, 143 S.E. 796.

²⁴ *County of Cumberland v Boyd*, 113 Pa. 52, 4 Atl. 346.

^{24a} "The appellees introduced the testimony of one of the members of the legislature which passed the law in controversy . . . but this testimony was clearly incompetent. If the intent of the legislature can be shown by inquiry of the members what was intended, it would be necessary to interrogate all the members of both the Senate and the House. Besides being an interminable job, it is not conceivable that a common intent would be the result. The intent of the legislature can only be determined by the language used, aided by the canons and rules of construction founded upon reason and experience. A legislative enactment cannot be amended or changed either by the insertion or elimination of words to conform with an intent proven by the testimony of the members of the enacting body." *Barlow v Jones*, 37 Ariz. 396, 294 Pac. 1106, 1107. ". . . their intentions must be ascertained by their acts alone, and not by evidence aliunde. We cannot possibly know the intentions of the members of the legislature: It is the will of the aggregate body, as expressed in the statutes which they pass, which can be regarded as having the force of law." *Common. v Churchill (Mass.)* 2 Metc. 118.

is little justification for a view which will refuse the court access to this extraneous assistance in its attempt to ascertain the intention of the legislature, particularly where it has been recorded. While, at best, if accepted, the views and statements of the legislators may not carry great weight,²⁵ they should be able to shed some light on any ambiguities which might be found in the statute.²⁶ Obviously, the value and weight of extraneous matter of this character, would depend upon the circumstances surrounding the expression of the opinion and the qualifications of the legislator who uttered the opinion.²⁷

It is also the general rule that the court may not resort to the motives of the legislature, except as they are expressed in the statute itself.²⁸ Of course, here too an important reason for denying recourse to the motive of the legislature, is the difficulty in discover-

²⁵ *State v Lancashire F. Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348. "We are referred to some expressions of individual legislators in urging the adoption of the provision as indicating that they thought it applied to the committees. Such expressions are no safe guide to the true meaning of a statute." *Quanah, etc., R. Co. v Panhandle, etc., R. Co.*, 67 Fed. (2) 826, 828. And in *U.S. v Mullendare*, 35 Fed. (2) 78, the discussions of the act when it was under consideration in the legislature may be looked into, to ascertain the meaning of a doubtful proviso.

²⁶ *Ex parte Farley*, 40 Fed. 66; *Haskell v Perkins*, 28 Fed. (2) 222 (legislators in charge of the bill); *Spahn v Stewart*, 268 Ky. 97, 103 S.W. (2) 651. At least, they shed light upon the general purposes of the statute and the evils sought to be remedied. *Humphrey's Exr. v U.S.*, 295 U.S. 602, 79 L.Ed. 1611, 55 S.Ct. 869.

²⁷ *Shallus v U.S.*, 162 Fed. 653, 89 C.C.A. 445; *Lapina v Williams*, 232 U.S. 78, 34 S.Ct. 196, 58 L.Ed. 515; *Truelove v City of Washington*, 169 Ind. 291, 82 N.E. 530; *Maynard v Johnson*, 2 Nev. 25.

²⁸ *Fletcher v Peck*, 6 Cranch (U.S.) 87, 3 L.Ed. 162; *Soon Hing v Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145; *Eddy v Morgan*, 216 Ill. 437, 75 N.E. 174; *Wichita v Burleigh*, 36 Kan. 34, 12 Pac. 332; *City of Lebanon v Creel*, 109 Ky. 363, 59 S.W. 16; *Third Dist. Land Co. v Toka* (La. Ap.) 170 So. 793; *Ellis v Boer*, 150 Mich. 452, 114 N.W. 239; *People v Shepherd*, 36 N.Y. 285; *McCabe v N.Y.*, 213 N.Y. 468, 107 N.E. 1049; *State v Eau Claire*, 40 Wis. 533. And especially note, *Wiseman v Madison Cadillac Co. (Ark.)* 88 S.W. (2) 1007, where the intention of the legislature to which the court must give effect, was held to be the intention expressed in the statute, and that the court would not inquire into the motives of the legislature or of individual members thereof in voting for the passage of the statute. But note *Spahn v Stewart*, 268 Ky. 97, 103 S.W. (2) 651, that the motives which influenced the legislature may be inquired into, where it is manifest that flagrant wrong has been perpetrated on the public. Also see *Glasgow v St. Louis*, 107 Mo. 198, 17 S.W. 743 (city ordinance).

ing it.²⁹ At best, so it has been asserted, the motive of the legislature consists of the motives, if any, of all the individual members. Consequently, it is not unlikely that when a law is passed or an amendment rejected, the court would generally be confronted with a difficult, if not impossible task should it be required to seek out in this manner the reason for the legislative action.³⁰

²⁹ *Badeau v U.S. (U.S.)* 21 Ct. Cl. 48; *Soon Hing v Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145; *Barlow v Jones*, 37 Ariz. 396, 294 Pac. 1106; *Delaplane v Crenshaw & Fisher (Va.)* 15 Grat. 457. "The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative Act is from the language used in the Act, and upon occasion, by a resort to the history of the times when it was passed." *U.S. v Freight Association*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007.

³⁰ *State v Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348. Also see *Tellevast v Kaminski*, 146 S.C. 225, 143 S.E. 796. "But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference. It cannot be proved by a member of the legislature or other person, whether interested in its enactment or not. A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent." *State v Partlow*, 91 N.C. 550. "Legislation is group activity and it is impossible to conceive of a group mind or group celebration. It is impossible, also, to trace in the legislative result, in any reliable way, the individual state of mind of the various legislators at any given moment. Legislation is an objective phenomenon in which all subjective antecedents are irrevocably lost. . . . Sometimes a specific act of legislation is traceable to a single individual who has publicly stated at a committee hearing what the act was sought to accomplish and in what manner. What the individual intended and even what he has publicly declared are irrelevant. He would not be competent to testify concerning his intention, and it has happened that an interpretation reached was at a variance with public declarations of the purpose of the draftsman." *Kocourek, An Introduction to the Science of Law*, § 41, pp. 201-202.

Of course, as a general rule, if the court is allowed to consult the opinions and motives of the members of the legislature in order to ascertain the legislative intent, the opinions and motives so consulted should in some manner be connected with the legislative process. For instance, statements made by a member of the legislature in a public address wherein he discussed the law in question, either before or after its passage, certainly should not be allowed to control the law's construction, or, for that matter, be considered a legitimate source of assistance. Similarly, the same objection, perhaps to a lesser degree, may be raised should the legislator be permitted to testify in court concerning his construction of the legislation involved. In either instance, the objection would seem to be well taken that these suggested sources of assistance are in no way connected with the legislative process, although logically it is difficult, on any other ground, to deny the court recourse to the testimony of an individual member of the legislature as to what his own intention was, at the time the law was passed, as evidence tending to show the collective legislative intent. But where the individual opinion or motive of a member of the legislative branch of the government is recorded and was expressed or revealed during the process of enacting the statute in question, and consequently is a part of the legislative records, its consideration should surely be allowed in order that the process of interpretation may not fail in its purpose. If the opinion is an incident of the legislative process—a part of the *res gestae*—and if such opinion can be shown to have been expressed, it is apparent that some aid must surely be found therein.

§ 214. Some Representative Views.—Undoubtedly, and as previously suggested, the better as well as more advanced view allows, in many cases, resort by the court to the opinions and motives of the legislators. It is difficult to advance any real reason for refusing access to the debates of members of the legislature, particularly where such debates are available when the law is being construed. This attitude has been taken in several cases. Thus, in *People ex rel Fleming v Dalton* (155 N.Y. 175, 52 N.E. 1113), the court said:

“If there is any doubt as to the meaning of the act, . . . or the intent of the legislature in passing it, recourse might be had to the records and journals of that body, showing the history of the measure, and the debates thereupon, for the purpose of

ascertaining that meaning and intention. . . . The counsel for appellant has submitted, as a part of his brief, a copy of the minutes of the debate on the act . . . taken by the official stenographer of the assembly."

A similar view was taken by the court in *West et al v Sun Cab Company, Inc.* (160 Md. 476, 154 Atl. 100):

"But while it is the province of the courts and not the legislature to interpret the law, the courts are not shut off from any discussion or sources of information available to the legislature in order to ascertain the legislative intent."

Commonwealth v West Philadelphia Fidelia Mannerchor (115 Pa. Super. 241, 175 Atl. 434, 436), however, represents the old as well as general view of the courts with reference to legislative debates:

"The argument which is urged most seriously by the appellant is based upon certain remarks made by members of the House when the act was being debated during its consideration. While we are of the opinion that the only safe guide in the instant case is the plain meaning of the act as expressed in the statute considered in the light to which we have heretofore referred, nevertheless those debates do not furnish a basis for a different construction even though we consider them. . . . In giving construction to a statute we cannot be controlled by the views expressed by a few members of the legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than 100 members who gave no such expression. The declaration of some, and the assumed acquiescence of others therein, cannot be adopted as a true interpretation of the statute."

Nevertheless, as we will see in the section discussing the history of the bill, even though resort may not be had to the debates to ascertain the legislative intent, many cases allow such resort in order to reveal the history of the statute under consideration. It is difficult to see why it would be proper to consider the legislative debates in the one instance and improper in the other. After all, the legislative history simply tends to reveal the legislative purpose in enacting the statute, and thereby sheds light upon the legislative intent. To permit resort to the debates simply to show the legislative history makes it necessary to draw a fine or perhaps invisible distinction.

It is doubtful whether any case more ably presents the view that opinions expressed by members of the legislature should not be

considered a legitimate source from which to obtain assistance in ascertaining the legislative intent, than does *Gosselin v The King* (33 Can. Sup. Ct. 255) :

“I would only say, that among the authorities upon which I rely I do not count the speech of the Lord Chancellor in the House of Lords. I was a party to the decision under which it was allowed to be quoted to us, and the ground upon which I thought it admissible was that it had, in the occasion upon which it was spoken and the position of the speaker, at least as great a sanction as the textbooks of living judges which have upon many occasions been admitted as authorities.

But, upon further consideration of the matter, I have been led to doubt very much whether the principle upon which such textbooks have been treated as authorities is a sound one; and, even if it were a sound one, I cannot but think the extension of it to speeches in a House of Parliament, sitting in a legislative capacity, however eminent may be the speakers, however solemn the occasion on which they speak, inexpedient in a very high degree. It is true that in many instances, and perhaps this particular one is a conspicuous example, the speech, looking to the circumstances under which it was made, the previous consideration which the speaker has given to the subject, and the character in which he speaks, may be entitled to far more weight than the hasty utterances of a judge at *nisi prius* or even the *obiter dicta* of a judge in banco; but the judge, in the latter cases, has the safeguard of a judicial proceeding cast around him; his mind is not likely to be influenced by a consideration beyond those which the law enforces upon him; while, when the scene is removed to the area of Parliament, political considerations may enter, as they have before now entered, into the opinions of lawyers upon legal subjects, and may insensibly affect the judgments of even the greatest and wisest of our judges. The sanction and safeguard of judicial procedure are removed, and even the conditions which give the textbook its weight, the exclusive devotion to the legal subject of which it treats, and the calmness with which it is necessarily prepared may, in many instances, not exist.”

§ 215. Committee Reports and Legislative Debates as Aids in Interpretation Distinguished.—We have elsewhere indicated that, in accord with the general rule, legislative debates should not be resorted to for assistance in ascertaining the intention of the legisla-

ture.^{30a} A number of cases, however, make a distinction between legislative debates and the reports of legislative committees, and it must be admitted that the latter undoubtedly do possess a more reliable or satisfactory source of assistance. This distinction is pointed out in *Imhoff-Berk Silk Dyeing Co. v. U. S.* (43 Fed. (2), 836, 837, 838):

“While legislative debates, partaking of necessity very largely of impromptu statements and opinions, cannot be resorted to, with any confidence as showing the true intent of Congress in the enactment of statutes, a somewhat different standard obtains with reference to the pronouncements of committees having in charge the preparation of such proposed laws. These committee announcements do not of course carry the weight of a judicial opinion, but are rightfully regarded as possessing very considerable value of an explanatory nature regarding the legislative intent where the meaning of a statute is obscure.”

A similar announcement will be found in *Commonwealth v. West Philadelphia Mannerchor* (115 Pa. Super. 241, 175 Atl. 434, 436):

“By repeated decisions of this court, it has come to be well-established that the debates of congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. . . . But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the meaning in a case where otherwise the meaning of a statute is obscure.”

Nevertheless, even though the reports of committees may be more trustworthy and because of their very nature entitled to more weight, it is suggested that since some assistance may also be obtained from the debates of the legislators, there is no valid reason why resort to them should be deemed improper. The time will undoubtedly come when the courts will generally resort to the debates for whatever assistance—be it ever so minute—that may be found there.

^{30a} *Supra*, § 213.

§ 216. **History of the Statute.**—According to the weight of authority, and surely the better view,³¹ the court may consider the general history of a statute, including its derivation,^{31a} that is, the various steps leading up to and attending its enactment, as shown by the legislative journals, in its effort to ascertain the intention of the legislature where it is in doubt.³² Conversely, the legislative history cannot be considered where the statute's meaning is plain.³³ As a result, amendments, or other modifications of a bill, and the

³¹ Penn. Mutual Life Ins. Co. v Lederer, 252 U.S. 523, 64 L.Ed. 698, 40 S.Ct. 397; Kelly v Dewey, 111 Conn. 281, 149 Atl. 840; Boshuizen v Thompson & Taylor Co., 360 Ill. 160; Manson v Village of Chisholm, 142 Minn. 94, 170 N.W. 94; Robertson v Texas Oil Co., 141 Miss. 356, 106 So. 449; State v Forest, 177 Mo. Ap. 245; State v Hays, 86 Mont. 58, 282 Pac. 32; People v Durston, 119 N.Y. 569, 24 N.E. 6; Woolcott v Shubert, 217 N.Y. 212, 111 N.E. 829; In re Miles Estate, 272 Pa. 329, 116 Atl. 300; In re James 99 Vt. 265, 132 Atl. 40; Burdick v Kimball, 53 Wash. 198, 101 Pac. 845; Foster v Sawyer County, 197 Wis. 218, 221 N.W. 768; Burnham Hotel Co. v City of Cheyenne, 30 Wyo. 458, 222 Pac. 1. *Contra*: Tennant v Kuhlemeier, 142 Iowa 241, 120 N.W. 689; State v Under-Ground Cable Co. (N.J. Ch.) 18 Atl. 581; Pierson v Cady, 84 N.J.L. 54, 86 Atl. 167; Bank of Pennsylvania v Common., 19 Pa. 144. Neither of these views, however, have any necessary relation to the journal entry rule previously discussed. See § 140, et seq., supra.

^{31a} Kelley v Dewey, 111 Conn. 281, 149 Atl. 840.

³² Tynan v Walker, 35 Calif. 634; Common. v Barney, 115 Ky. 475, 74 S.W. 181; Scouten v Whatcom, 33 Wash. 273, 74 Pac. 389. "A statute which within itself is clear should be construed as it reads. Resort may be and should be had to the genesis and evolution of statutes to explain, but not to discover, ambiguity." Burrill v Edminister, 119 Me. 367, 111 Atl. 423, 425. "The history of a statute, from the time it was introduced until it was finally passed, may afford some aid to its construction. The report of committees, the introduction of amendments, and the opposition made to the passage of a statute in its various forms, are legitimate aids to its construction." In re Valhoff, 238 Fed. 405, 407-408. And where the court adheres to the conclusiveness of the enrolled bill, note the following statement: "The court . . . held that the enrolled act . . . is the sole exposition of its contents, and the conclusive evidence of its existence according to its import, and that it is not allowable to look further to discover the history of the act or ascertain its provisions." *Ex parte Wren*, 63 Miss. 512. Yet, what better evidence of the history of a statute's origin exists, than that revealed by the legislative journals?

³³ U.S. v Mo. Pac. R. Co., 278 U.S. 269, 72 L.Ed. 322, 49 S.Ct. 133; In re Hilliker (D.C.-Calif.) 9 Fed. Sup. 948; Maryland Cas. Co. v Sutherland (Fla.) 169 So. 679; Duncan v Combs, 131 Ky. 330, 115 S.W. 222; Burrill Nat. Bank v Edminister, 119 Me. 367, 111 Atl. 423; Shenandoah Lime Co. v Mann, 115 Va. 865, 80 S.E. 753.

legislature's action thereon,³⁴ messages from the chief executive,³⁵ reports of legislative committees,³⁶ testimony produced before a committee,³⁷ and even the debates in the legislature,³⁸ may be resorted to as indicia of the legislative intent where it is obscure.

³⁴ U.S. v St. Paul, etc., R. Co., 247 U.S. 310, 62 L.Ed. 1130, 38 S.Ct. 525; State v Amos, 76 Fla. 26, 79 So. 433; Mushel v Schulz, 139 Minn. 234, 166 N.W. 179; In re Hamlin, 226 N.Y. 407, 124 N.E. 4; Travis v American Cities Co., 182 N.Y.S. 394, 192 Ap. Div. 16; State v McCollister, 11 Ohio 46; State v Hamilton, 92 Wash. 347, 159 Pac. 379. But note Lane v Kolb, 92 Ala. 636, and Stone & Downer Co. v U.S., 12 Ct. Cust. App. 62, to the effect that the mere introduction or failure to finally include an amendment cannot be considered. But the rejection of an amendment should be given weight. People's Gas & Light Co. v Ames, 359 Ill. 152, 194 N.E. 260.

³⁵ Clendaniel v Conrad, 26 Dela. 549, 83 Atl. 1036; Sullivan v City of Butte, 65 Mont. 495, 211 Pac. 301; State v Gillespie, 39 N.D. 512, 168 N.W. 38.

³⁶ Pennsylvania R. Co. v International Coal Co., 230 U.S. 184, 57 L.Ed. 1446, 33 S.Ct. 893; Ayers v Parker (D.C.-Md.) 15 Fed. Sup. 447; Woolcott v Shubert, 217 N.Y. 212, 111 N.E. 829; Rice v Denny, 199 N.C. 154, 154 S.E. 69; Harrington v Smith, 28 Wis. 43. **Contra:** Bank of Pennsylvania v Common., 19 Pa. 144. Letters and petitions presented to a committee, or reports of administrative officers or commissions, should not be considered. Thomas v F. B. Vandergrift, 162 Fed. 645, 89 C.C.A. 437; Browne v Turner, 174 Mass. 150, 54 N.E. 510. And where the terms of the statute is clear, the legislative intent must be derived therefrom, even though it is in conflict with the purpose of the act as expressed in the committee report. Sivley v Comr. of Internal Revenue, 75 Fed. (2) 916. Note also Nolan v U.S., 41 Fed. (2) 962, that the report of a committee made at the time the bill is reported by the committee to congress for consideration, will be treated by the courts as having great and generally controlling weight in the construction of a statute enacted on the strength of such report.

³⁷ Suckowski v Norton (D.C.-Pa.) 16 Fed. Sup. 677. But note U.S. v Paramount Publix Corp., 73 Fed. (2) 103, that a statement made at the hearing before a committee should not be resorted to in order to determine the intent of the legislature. Yet, an explanatory statement, in the nature of a supplemental report, made by the committee member having the bill in charge, may be considered. Nolan v U.S., 41 Fed. (2) 962.

³⁸ Johnson v Southern Pac. R. Co., 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363; Humphrey's Ex'r v U.S., 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611; Louisville & N. R. Co. v State, 201 Ala. 317, 78 So. 93, app. dis. 248 U.S. 533, 63 L.Ed. 406, 39 S.Ct. 18; Sato v Hall, 191 Calif. 510, 217 Pac. 520; Fleming v Dalton, 158 N.Y. 175, 52 N.E. 1113. And the fact that there was common agreement in debate may be considered. Fed. Trade Comm. v Raladam Co., 51 S.Ct. 587. Undoubtedly, by virtue of the rules expressed in the above text, it is proper to resort to the arguments submitted to the voters at the time the law was adopted by the voters as an initiated measure. Beneficial Loan Assn. v Haight, 215 Calif. 506, 11 Pac. (2) 857. People v Fowler (Calif.) 84 Pac. (2) 326.

There is, however, considerable difference concerning the consideration which may be given to the statements or views of the legislators. As we have already seen,³⁹ generally such statements or views may not be resorted to, although the rule is sometimes departed from. They may be resorted to as constituting a part of the history of the times when the statute was enacted,⁴⁰ even where the rule prevails that legislative debates may not be used as a means for interpreting a statute.⁴¹ They may be urged as confirming a construction reached by the court without their assistance.⁴² And they may be used to ascertain the evil the statute aimed to remedy,⁴³ or the necessity which brought about the enactment.⁴⁴

Most important legislation has had a history, not only prior to the first attempt to secure its adoption by the legislature, but also after its first appearance in the form of a legislative bill. Frequently, pre-legislative agitation has extended over a long period of time. Often the origin of the idea, which at a later date takes the form of a statute, is unknown. If these pre-legislative circumstances can be considered by the court in its attempt to ascertain the legislative

³⁹ See § 213, *supra*.

⁴⁰ *Standard Oil Co. v U.S.*, 221 U.S. 1, 55 L.Ed. 619, 31 S.Ct. 502; *State v Nichols*, 30 La. Ann. 980; *Maynard v Johnson*, 2 Nev. 25; *Keyport, etc., Co. v Farmers Transport Co.*, 18 N.J. Eq. 13; *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829; *Williams v Nashville*, 89 Tenn. 487, 15 S.W. 364; *Ex parte Peede*, 75 Tex. Cr. 247, 170 S.W. 749; *City of Richmond v Supervisors*, 83 Va. 204, 2 S.E. 26. Also note *State v Hall*, 141 Wis. 30, 123 N.W. 251, and *Petition of Bone*, 19 Fed. Sup. 219. But see *Plunkett v Old Colony T. Co.*, 233 Mass. 471, 124 N.E. 265.

⁴¹ See *U.S. v Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829.

⁴² *Hepburn v Griswold*, 8 Wall. (U.S.) 603, 19 L.Ed. 513. Also note *Maxwell v Brayshaw*, 258 Fed. 957, that legislative debate is persuasive of a suggested legislative intention. Also see § 209, note 4, and § 174, *supra*.

⁴³ *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829.

⁴⁴ *Keith v Quinley*, 1 Ore. 364; *People v Board of Supervisors*, 43 N.Y. 130. "In construing a statute we have a right to consider relevant conditions existing when it was adopted. The particular mischief it was designed to remedy and the history of the period and of the statute may be considered. We are at liberty to study the debates in seeking and determining the evil against which it was aimed as a remedy. In case they clearly and definitely describe an unworthy or mischievous condition necessitating in the legislative mind, the statute, they furnish the court, laboring to discover the intent of the legislature, with a legitimate and trustworthy aid." *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829.

intent, as much, if not a stronger reason may be found for considering the legislative history of a law. Usually, before a law is enacted, it will have made several appearances in the legislature, and sometimes in various forms. Even where it appears only once, each and every step in the legislative process will shed some light upon the meaning of the enacted law. If the law to be construed is the result of amendment, a consideration of the old law with the new must surely reveal a legislative aim or purpose. Indeed, when each and every step or event in the history of a statute is considered, in most cases, at least, a legislative purpose may be discovered. And naturally this purpose will point toward the legislative meaning.

§ 217. **The Principle Illustrated.**—The extent to which the court may go, in its effort to discover the legislative intent by resorting to the history of the enactment, is revealed in *People v Odierno* (166 Misc. 108, 2 N.Y.S. (2) 99), where a married man, who lived with an eighteen-year-old girl, not his wife, in a furnished room, was indicted under the Compulsory Prostitution Statute. Since the statute expressly covered voluntary as well as involuntary prostitution, the only question presented was whether this defendant otherwise came within the scope of the law.

“In considering this question, resort may be had to the investigation and reports made public in the last ten years, showing the wide extent of commercialized prostitution. The evil of exploiting prostitution by taking toll of the wages of women who make themselves common, which by incentives for profit tends to systematize and extend prostitution, had been the subject of detailed reports and strong denunciation. . . . These investigators pointed out that taking a percentage of the earnings of women engaged in prostitution was a leading cause of the growth and wide extent of this vice in cities, so that to stop such division of these wages would be the first step toward reducing the evil. . . . Even with the lax ideas on the subject on the continent of Europe, this sharing of the earnings of prostitution is recognized as intensifying the spread of this evil; and in Vienna it seems to be prohibited. By the regulations of that city a prostitute may live in a house, or have apartments on condition that the landlady ‘must have no share or percentage in the proceeds of the vicious trade’. Brothels are not to be established ‘in which the mistress of the house figures as the entrepreneur or manager of the business’.

“Prostitution among the ancients, and in the middle ages, has been exploited for the purpose of public revenue. In the

great centers of modern civilization a system of professional exploiters of this evil leads to that intensity of vice which has always been a mark of a rotten or declining civilization. All this was before the New York Legislature in 1910, which plainly intended by severe penalties to break up such an abhorrent traffic. . . .

“The evolution of § 2460 . . . constitutes an attempt on the part of the legislature to cope with the evil of commercialized prostitution. The statute was not intended to place the erring male at the mercy of the erring female, nor was it directed against individual or isolated acts of prostitution. Rather was it directed against influential offenders whose business was to reach the systematization of prostitution on a commercial basis.”

Consequently, the indictment against the above defendant was dismissed.

Another excellent illustration of the court's consideration of the history of a statute in order to ascertain the legislative intention will be found in *United States v Raynor* (302 U.S. 540, 58 S.Ct. 353, 82 L.Ed. 413). Congress had enacted a statute which provided that the possession of paper similar to that used by the government in printing its obligations constituted a crime, and the defendant was charged with violating the statute. In deciding that the possession of paper similar but not identical to that used by the government fell within the scope of the statutory prohibition, the court announced:

“Beginning December, 1860, congress to meet imperative needs, again authorized great increases in government obligations. By July, 1862, new issues of currency and unsettled conditions had so stimulated counterfeiting that congress made special funds available to detect and punish those guilty of the crime. . . . By July, 1864, . . . the counterfeiter had become a still greater public enemy.

“Under these circumstances, with more currency to be issued, and the necessity for protection from counterfeiters greatly accentuated, congress once more re-enacted the 1837 act and made it a more effective weapon against counterfeiters. The element of intent was stricken from the offense and the mere unauthorized possession of imitation paper was made a crime. . . . The section now under consideration is plainly a culmination of a long series of legislative acts, each of which has declared it to be a crime to have possession of paper counterfeit-

ing the distinctive paper, and suitable to be made into counterfeit obligations. Each change since 1837 was intended to make the possession of counterfeit paper more dangerous for counterfeiters."

A similar resort to the history of an enactment took place in *Sachs v Board of Registration in Medicine* (Mass.—15 N.E. (2) 473) where a physician, who was associated with a lay person in the optical business, was charged with violating the statute which prohibited a physician from carrying on the practice of medicine with an unlicensed person. The physician diagnosed defective vision but used no drugs and performed no surgical operations. In reaching the decision that no violation of the law had occurred, the court stated:

"... the question now before us is purely one of statutory construction. As to such a question, reference should first be had to the statutes themselves for such assistance as may be derived from their language, *their chronology*, and their forms and structure with relation to each other."

§ 218. Contemporaneous Construction and Usage, Generally.

—Where the meaning of a statute is in doubt, the court may resort to contemporaneous construction—that is, the construction placed upon the statute by its contemporaries at the time of its enactment and soon thereafter—for assistance in removing any doubt.⁴⁵ Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its en-

⁴⁵ *U.S. v State Bank*, 6 Pet. (U.S.) 29, 8 L.Ed. 308; *Ledbetter v Hall* (Ark.) 87 S.W. (2) 996; *People v Kipley*, 171 Ill. 44, 49 N.E. 229, 41 L.R.A. 775; *Fall v Hazelrigg*, 45 Ind. 576; *State v Briede*, 117 La. 183, 41 So. 487; *Brown v Foster*, 88 Me. 49, 33 Atl. 662, 31 L.R.A. 116; *Packard v Richardson*, 17 Mass. 122; *Warren v Board of Registration*, 72 Mich. 398, 40 N.W. 553; 2 L.R.A. 203; *Venable v Wabash, etc., R. Co.*, 112 Mo. 103, 20 S.W. 493, 18 L.R.A. 68; *Smith v Southern Pac. R. Co.*, 50 Nev. 377, 262 Pac. 935; *People v Ballard*, 134 N.Y. 269, 32 N.E. 54, 17 L.R.A. 737; *Gill v Board of Com'rs*, 160 N.C. 176, 76 S.E. 203, 43 L.R.A. (N.S.) 293; *Huntworth v Tanner*, 87 Wash. 670, 152 Pac. 523; *Smith v Bryan*, 100 Va. 199, 40 S.E. 652. Also note *Briscoe v Bugbee*, 163 Miss. 574, 143 So. 887, that the rule of contemporary construction is as old as the common law. It is also applicable to penal statutes. *Smith v State* (Tex.) 300 S.W. 82.

actment⁴⁶ and acquiesced in by the courts and the legislature for a long period of time.⁴⁷ As is obvious, the meaning given to the language of a statute by its contemporaries is more likely to reveal its true meaning than a construction given by men of another day or generation.⁴⁸ Even words change in meaning with the march of time. And the meaning given by contemporaries can be revealed with no more certainty than by resort to the common usage and practice under the statute itself over a considerable period of time.

To be sure, contemporaneous construction may not be controlling,⁴⁹ yet it is obviously entitled to considerable weight,⁵⁰ especially where men have acted under a particular interpretation of the statute for a long time. Such a construction should not be rejected

⁴⁶ Maynard v Elliot, 283 U.S. 273, 51 S.Ct. 390, 75 L.Ed. 1028; Fairfield v Foster, 25 Ariz. 146, 214 Pac. 319; Himrod Coal Co. v Stevens, 104 Ill. Ap. 639, aff. 67 N.E. 389, 203 Ill. 115; Frazier v Warfield, 13 Md. 279; State ex rel Kimbrell v Becker, 291 Mo. 409, 237 S.W. 117; Holt v Sather, 81 Mont. 442, 264 Pac. 108; Beers v Hotchkiss, 256 N.Y. 41, 175 N.E. 506; Broussard v Cruse (Tex. Civ. Ap.) 154 S.W. 347; State v Davis, 62 W.Va. 500, 60 S.E. 584; State v Frear, 138 Wis. 536, 120 N.W. 216.

⁴⁷ U.S. v Graham, 110 U.S. 219, 28 L.Ed. 126, 3 S.Ct. 582; Shepherd v Sartain, 185 Ala. 439, 64 So. 57; Healey v Superior Ct., 167 Calif. 22, 138 Pa. 687; Graham v Joyce, 151 Md. 298, 134 Atl. 332; Swan v Justices, 222 Mass. 542, 111 N.E. 386; Detroit City R. Co. v Mills, 85 Mich. 634, 48 N.W. 1007; State ex rel Chick v Davis, 273 Mo. 660, 201 S.W. 529; O'Donnell v Glenn, 9 Mont. 452, 23 Pac. 1018, 8 L.R.A. 629; Matter of N.Y., 217 N.Y. 13, 111 N.E. 256. Also see cases under note 46, supra.

⁴⁸ See Rex v Casement (Eng.) 1 K.B. 98. Moreover, it is probably a true expression of the legislative purpose. Savings Bank v Wilcox, 117 Conn. 188, 167 Atl. 709.

⁴⁹ U.S. v First Nat. Bank, 206 Fed. 374, 124 C.C.A. 256, rev. on other grounds, 190 Fed. 336; State v Bennett, 187 Ky. 626, 220 S.W. 517; State v Riechmann, 239 Mo. 81, 142 S.W. 304; People v Comstock, 78 N.Y. 356; Shields v Williams, 159 Tenn. 349, 19 S.W. (2) 261. But see Hennepin County v Ryberg (Minn.) 210 N.W. 105.

⁵⁰ "*Optima est legum interpres consuetudo.*" Westerman v Supreme Lodge, 196 Mo. 670, 94 S.W. 470; Packard v Richardson, 17 Mass. 122; "*Contemporanea expositio est optima et fortissima in lege.*" Curtis v Leavitt, 15 N.Y. 9. Also see McKeen v Delancy, 5 Cranch (U.S.) 22, 3 L.Ed. 25. It is persuasive. Holt v Sather, 81 Mont. 442, 264 Pac. 108, and Bridgeman v Derby, 104 Conn. 1, 132 Atl. 25, 45 A.L.R. 728.

by the courts except for strong and forcible reasons,⁵¹ nor is such a construction to be lightly overturned.⁵²

But when usage is considered, it must be public, general and practical,⁵³ and of long duration.⁵⁴ These are indispensable requirements, without which, a resort to usage would clearly in most instances operate to defeat rather than to effectuate the legislation intent. At least, it would be an extremely dangerous practice upon the part of any court, for the chance would always lurk near that the usage considered might obscure the real meaning intended to be conveyed by the law-makers. Only where the usage is general and of long duration, could it have any real claim for consideration. If the people generally, over a long period of time, have construed a statute to mean a certain thing, they have thereby indicated that that must be its apparent meaning. And where the legislature permits that construction to stand for a long period of time, it obviously acquiesces therein and impliedly gives it its approval. Clearly, these elements which justify resort to usage, are lacking where the usage is not general and of long standing.

One of the most enlightening cases upon the practical construction of a statute is that of *Willey v McElligott* (3 N.Y. (2) 434, 167 Misc. 101), from which the following excerpt is taken:

“The review of the history of fire marshals indicates quite clearly that the proper construction of the legislation affecting them requires a finding that these plaintiffs are not members of the uniformed force. The practical construction placed thereon by the Municipal Civil Service Commission in its

⁵¹ *First Nat. Bank v U.S.*, 206 Fed. 374, 124 C.C.A. 256, rev. on other grounds, 190 Fed. 336; *Smith v Smith*, 120 Me. 379, 115 Atl. 87; *City of Baltimore v Machen*, 132 Md. 618, 104 Atl. 175; *Cameron v Merchants & Manufacturer's Bank*, 37 Mich. 239; *McCarthy v Woolston*, 205 N.Y.S. 507, 210 Ap. Div. 152; *Atty.-Gen. v Bank of Cape Fear*, 40 N.C. 71; *Appeal of Reeves*, 33 Pa. Super. 196; *State v Clausen*, 78 Wash. 103, 138 Pac. 653; *State v Frear*, 138 Wis. 536, 120 N.W. 216. Then, too, a rejection of a long acquiesced in construction, would often operate harshly. *Rogers v Goodwin*, 2 Mass. 475; *State v Northern Pac. R. Co.*, 95 Minn. 43, 103 N.W. 731.

⁵² *Dismuke v U.S. (U.S.)* 56 S.Ct. 400. In fact, only compelling language warrants the rejection of a long and generally accepted construction. *Maynard v Elliott*, 283 U.S. 273, 51 S.Ct. 390, 75 L.Ed. 1028.

⁵³ *Matz v Chicago, etc., R. Co.*, 85 Fed. 180; *People v Borda*, 105 Calif. 636, 38 Pac. 1110; *Himrod Coal Co. v Stevens*, 104 Ill. Ap. 639; *Wear v Bryant*, 5 Mo. 147; *Fears v Riley*, 148 Mo. 49, 49 S.W. 836; *State v Southern R. Co.*, 122 N.C. 1052, 30 S.E. 133, 41 L.R.A. 246. Local usage cannot con-

grading of examinations, by the city officials in making up budgets, by the legislature in its attempted legislation of 1919, and by plaintiffs themselves in voluntarily accepting salaries differing from those paid uniformed firemen and contributing therefrom for many years to the Retirement Fund, fully confirm the decision reached. Such practical construction by officials charged with the duty of administering the laws in question, by the legislature, and by plaintiffs and their predecessors in office, is persuasive proof in support of the interpretation suggested by the history of the statutes. *City of New York v New York City R. Co.*, 193 N.Y. 543, 86 N.E. 565. As there pointed out by Judge Vann, 'when the meaning of a statute is doubtful, a practical construction by those for whom the law was enacted, or by public officers whose duty was to enforce it, acquiesced in by all for a long period of time . . . is entitled to great if not controlling influence'."

Considerable reliance upon the practical construction of a legislative enactment as an aid to the court in ascertaining the intent of the legislature, will also be found in *People v Miller* (1 N.Y.S. (2) 267, 164 Misc. 726), where the property of a Masonic corporation, part of which was used as a meeting place for lodges, and all the net income of the part rented for mercantile purposes was used in building and maintaining a home for indigent members and their families, was held exempt from taxation, under a special statute exempting from taxation the realty owned or acquired for the construction and maintenance of an asylum so long as the entire income was used exclusively for benevolent and charitable purposes.

trol the meaning of a general statute, *U.S. v Pine River Logging, etc., Co.*, 89 Fed. 915; *City of Chicago v Becker*, 233 Ill. 189, 84 N.E. 242; *Twohy Bros. Co. v Ochoco Irr. Dist.*, 108 Ore. 1, 210 Pac. 873; *Evans v Myers*, 25 Pa. 1; *Currie v Page*, 2 Leigh (Va.) 617, but local statutes may be controlled by the construction given in the locality where they are applicable. *Frazier v Warfield*, 13 Md. 279.

⁵⁴ *U.S. v Farrar*, 38 Fed. (2) 515, aff. 281 U.S. 624, 50 S.Ct. 425, 74 L.Ed. 1078, 68 A.L.R. 892 (10 years); *McIntire v McIntire*, 130 Me. 326, 155 Atl. 731 (56 years); *People v Hurst*, 41 Mich. 328, 1 N.W. 1027 (20 years); *Green v Bancroft*, 75 N.H. 204, 72 Atl. 373 (120 years); *Common. v Mann*, 168 Pa. 290, 31 Atl. 1003 (20 years); *Bates v Hacking*, 29 R.I. 1, 68 Atl. 622 (37 years); *State v Frear*, 138 Wis. 536, 120 N.W. 216 (50 years). If the period is a reasonable one, it should be sufficient. And, of course, usage could not be applicable to a law only recently enacted. There must also be a course of conduct and not simply one instance. *Maysville Water Co. v Stockton*, 221 Ky. 610, 299 S.W. 582.

"In the sense which this statute uses the word, it seems beyond dispute that by asylum is meant 'an institution for the protection or relief of some class of destitute, unfortunate or afflicted persons', and that the word 'income' as there employed means 'something that comes in addition or increment; a gain or recurrent benefit (usually measured in money) which proceeds from labor, business, or property, and is synonymous with gain, profit, proceeds—receipts, interest, emolument, or produce. . . . Looking then to the declared objects and purposes of the relator which, only three years before the enactment, it had espoused as the cause of its creation, we can see no other reasonable interpretation of the phrase in question than that it meant the very place, it being then the only place, it owned, and upon which it was to build a meeting place for the purpose of fraternity and out of the revenue and income from which it designated to practice its declared purposes of charity and benevolence. . . . This view is strengthened by the fact that, concededly, all parties in interest, personally and officially, acted in accordance with this interpretation for the ensuing 64 years. It has been held that: 'There is no question that the practical construction of a statute by those for whom the law was enacted or by public officers whose duty it is to enforce it, acquiesced in by all for a long period of time is of great importance in its interpretation in a case of serious ambiguity'."

And, of course, it must always be kept in mind, as a basic requirement, that contemporaneous construction can be used only where the statute is obscure or ambiguous and its meaning cannot be ascertained by resort to intrinsic matters.⁵⁵ This is equally true with reference to common usage and practice.⁵⁶

⁵⁵ *Houghton v Payne*, 194 U.S. 88, 24 S.Ct. 590, 48 L.Ed. 888; *First National Bank v Watters*, 201 Ala. 670, 79 So. 242; *Eddy v Morgan*, 216 Ill. 437, 75 N.E. 174; *Sewell v Bennett*, 187 Ky. 626, 220 S.W. 517; *Miller v Iowa-Neb. Light & Power Co. (Neb.)* 262 N.W. 855; *Minneapolis, etc., Ry. Co. v Industrial Comm.*, 153 Wis. 552, 141 N.W. 1119. It has no application where the contemporaneous construction conflicts with the plain language, *McNally v Grauman*, 255 Ky. 201, 73 S.W. (2) 28, or the statute is free from ambiguity. *State v Kearney & Sons*, 181 La. 544, 160 So. 77.

⁵⁶ *Swift & Co. v U.S.*, 104 U.S. 691, 26 L.Ed. 1108; *People v Whittemore*, 253 Ill. 378, 97 N.E. 683; *McCrary v McFarland*, 93 Ind. 466; *Lord v Burbank*, 18 Me. 178; *Horton v Horton*, 157 Md. 127, 145 Atl. 355; *Stearns v Vincent*, 237 Mich. 390, 211 N.W. 665; *State v Erickson*, 152 Minn. 349, 188 N.W. 736; *Beers v Hotchkiss*, 256 N.Y. 41, 175 N.E. 506; *State v Southern R. Co.*, 122 N.C. 1052, 30 S.E. 133, 41 L.R.A. 246; *Common. v Stewart*, 286 Pa. 511, 134 Atl. 392; *Smyth v Walton*, 24 S.W. 1084. 5 Tex. Civ. Ap. 673.

§ 219. **Executive Construction.**—As a general rule executive and administrative officers will be called upon to interpret certain statutes long before the courts may have an occasion to construe them.⁵⁷ Inasmuch as the interpretation of statutes is a judicial function,⁵⁸ naturally the construction placed upon a statute by an executive or administrative official will not be binding upon the court.⁵⁹ Yet where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers,⁶⁰ who are charged with executing the statute,⁶¹ and especially if such construction has been observed and acted upon for a

⁵⁷ U.S. v Lytle, Fed. Cas. No. 15,652.

⁵⁸ See § 13, *supra*.

⁵⁹ Texas & P. Ry. Co. v U.S., 289 U.S. 627, 77 L.Ed. 1410, 53 S.Ct. 768; City of Roswell v Telephone & Telegraph Co. (C.C.A.—N.M.) 78 Fed. (2) 379; Bloxham v Consumers Electric Co., 36 Fla. 519, 18 So. 144; Smoot v Bankers Life Assoc., 138 Mo. Ap. 438, 120 S.W. 719; State ex rel Pindall v Ross, 55 Wash. 242, 104 Pac. 216. Although the courts may not ignore executive interpretation of a statute, such interpretation is immaterial in the sense that courts alone may finally declare the meaning of statutes. American Exchange Securities Corp. v Helvering, 74 Fed. (2) 213. Also see In re Davidson's Estate, 244 N.Y.S. 616, aff'd 258 N.Y.S. 42.

⁶⁰ Especially by the highest officers in the department. U.S. v Stump, 292 Fed. 354; Parker v Board of Dental Examiners (Calif. Ap.) 1 Pac. (2) 501 (legal advisor); Read Drug Co. v Claypoole (Md.) 166 Atl. 742 (attorney-general's opinion); People v Robinson, 241 Mich. 497, 217 N.W. 902; Gill v Board of Comrs., 160 N.C. 176, 76 S.E. 203; Tulare Independent School v Crandon, 47 S.D. 391, 199 N.W. 451; Barber v Danville, 149 Va. 418, 141 S.E. 126; State v Case (Wash.) 19 Pac. (2) 927 (attorney-general's opinion); Harrington v Smith, 28 Wis. 43. Among other officers, are: clerks of the courts, Williams v Williams, 325 Mo. 963, 30 S.W. (2) 69; banking department, Huntsville Trust Co. v Noel, 321 Mo. 729, 12 S.W. (2) 751; civil service department, Scott v Commr. of Civil Service, 272 Mass. 237, 172 N.E. 218; election officials, In re Graves, 325 Mo. 888, 30 S.W. (2) 149; game and fish department, State v Evans, 21 Ohio Ap. 168, 152 N.E. 776; highway department, Wayne County v Fuller, 250 Mich. 227, 229 N.W. 911; insurance commissioner, Manel v Wisconsin Auto. Ins. Co., 211 Wis. 230, 248 N.W. 121; tax department, DeBlois v Commission of Corps., 276 Mass. 437, 177 N.E. 566; workmen's compensation commission, Congoleum Nairn v Brown, 158 Md. 285, 148 Atl. 220, 67 A.L.R. 780.

⁶¹ Durkee-Atwood Co. v Willcutts (C.C.A.—Minn.) 83 Fed. (2) 995; In re Lawrence Cedar-hurst Bank, 288 N.Y.S. 301, 247 Ap. Div. 528.

long period of time, and generally or uniformly acquiesced in,⁶² it will not be disregarded by the courts, except for the most satisfactory, cogent or impelling reasons.⁶³ In other words, the administrative construction generally should be clearly wrong before it is overturned.⁶⁴ Such a construction, commonly referred to as practical construction,⁶⁵ although not controlling,⁶⁶ is nevertheless en-

⁶² *State ex rel Woodward v Lee* (Fla.) 155 So. 138; *State of Wisconsin v State of Ill.*, 278 U.S. 367, 73 L.Ed. 426, 49 S.Ct. 163; *Coombe v U.S.*, 3 Fed. (2) 714, 55 App.D.C. 190; *Stewart v Wilson Printing Co.*, 210 Ala. 624, 99 So. 92; *People v Ill. Central R. Co.*, 273 Ill. 220, 112 N.E. 700; *Common. v Gregory*, 121 Ky. 256, 136 S.W. 168; *State v Southern Pac. Co.*, 137 La. 435, 68 So. 819; *Weil v State* (Md.) 132 Atl. 436; *People v Robinson*, 241 Mich. 497, 217 N.W. 902; *Hennepin County v Ryberg*, 168 Minn. 385, 210 N.W. 105; *Robertson v Texas Oil Co.*, 141 Miss. 356, 106 So. 449; *Williams v Williams* (Mo.) 30 S.W. (2) 69; *State v Brannon*, 86 Mont. 200, 283 Pac. 202, 67 A.L.R. 1020; *State v Bryan*, 112 Neb. 692, 200 N.W. 870; *State v Kelsey*, 44 N.J.L. 1, *Matter of Tiffany*, 179 N.Y. 455, 72 N.E. 512; *Gill v Board of Comrs.*, 160 N.C. 176, 76 S.E. 203; *State v Brown*, 121 Ohio St. 73, 166 N.E. 903; *Hunter v State*, 49 Okla. 672, 154 Pac. 545; *Spencer v Portland*, 114 Ore. 381, 235 Pac. 279; *Neff v Elgin* (Tex. Civ. Ap.) 270 S.W. 873; *Murdock v Mabey*, 59 Utah 346, 203 Pac. 651; *State v Arnold*, 151 Wis. 19, 138 N.W. 78.

⁶³ *McLaren v Fleischer*, 256 U.S. 477, 41 S.Ct. 577, 65 L.Ed. 1052; *Globe Indemnity Co. v Bruce* (C.C.A.—Okla.) 81 Fed. (2) 143; *State v Fidelity Health, etc., Co.*, 79 Ind. Ap. 377, 135 N.E. 387; *New York Life Ins. Co. v Burbank* (Iowa) 216 N.W. 742; *People v Detroit, etc., R. Co.*, 228 Mich. 596, 200 N.W. 536; *O'Connor v Gertgens*, 85 Minn. 481, 89 N.W. 866; *McCarthy v Woolston*, 205 N.Y.S. 507, 210 Ap. Div. 152; *State v Brown*, 121 Ohio St. 73, 166 N.E. 903; *Spencer v Portland*, 114 Ore. 381, 235 Pac. 279. If the departmental construction is clearly erroneous, it should be rejected. *Lucas v American Code Co.*, 280 U.S. 445, 50 S.Ct. 202, 74 L.Ed. 538, 67 A.L.R. 1010; *Graham v Joyce*, 151 Md. 298, 134 Atl. 332; *Board of Education v Goodrich*, 208 Mich. 646, 175 N.W. 1009; *Williams v Williams* (Mo.) 30 S.W. (2) 69; *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883; *Koy v Schneider*, 110 Tex. 369, 218 S.W. 479, 221 S.W. 880.

⁶⁴ *Duke Power Co. v South Carolina Tax Comm.* (C.C.A.—S.C.) 81 Fed. (2) 513; *Robinson v Fix* (Fla.) 151 So. 512. It will be overruled where arbitrary and against the letter and spirit of the law. *St. Bernard Syndicate v Grace*, 169 La. 666, 125 So. 848. But see *Hennepin County v Ryberg* (Minn.) 210 N.W. 105.

⁶⁵ *Highfield v Delaware Trust Co.* (Dela.) 188 Atl. 919; *Hennepin County v Ryberg* (Minn.) 210 N.W. 105.

⁶⁶ See cases under note 62 *supra*.

titled to considerable weight.⁶⁷ It is highly persuasive.⁶⁸

And where vested rights have grown up under the departmental construction, the courts are justified in being more reluctant than in ordinary cases in adopting a construction which will destroy or disturb such rights.⁶⁹ A similar reluctance is also proper where a departure from the executive interpretation will result in injus-

⁶⁷ *U.S. v Jackson*, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361; *Durkee-Atwood Co. v Willcuts* (C.C.A.—Minn.) 83 Fed. (2) 995; *Moore v Tillman*, 170 Ark. 895, 282 S.W. 9; *Riley v Thompson*, 193 Calif. 773, 227 Pac. 772; *People v Mooney*, 87 Colo. 567, 290 Pac. 271; *Amos v Moseley*, 74 Fla. 555, 77 So. 619; *Howell v State*, 71 Ga. 224; *Mathews v Shores*, 24 Ill. 27; *Sewell v Bennett*, 220 S.W. 517, 187 Ky. 626; *Wayne County v Fuller*, 250 Mich. 227, 229 N.W. 911; *State v Wheatley*, 113 Miss. 555, 74 So. 427; *Automobile Gasoline Co. v City of St. Louis* (Mo.) 32 S.W. (2) 281; *State v Brannon*, 86 Mont. 200, 283 Pac. 202; *State v Cole*, 38 Nev. 215, 148 Pac. 551; *Wyatt v Equalization Board*, 74 N.H. 552, 70 Atl. 387; *Bullock v Cooley*, 225 N.Y. 566, 122 N.E. 630; *Hannah v Board of Commrs.*, 176 N.C. 395, 97 S.E. 160; *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883; *McCain v State Election Bd.*, 144 Okla. 85, 289 Pac. 759; *Kesley v Norblad* (Ore.) 298 Pac. 199; *Garr v Fuls*, 286 Pa. 137, 133 Atl. 150; *Sloan v Columbia*, 144 Tenn. 197, 232 S.W. 663; *Slocomb v Cameron School Dist.*, 116 Tex. 288, 288 S.W. 1064; *Murdock v Mobey*, 59 Utah 346, 203 Pac. 651; *Superior Steel Corp. v Common.*, 147 Va. 202, 136 S.E. 666; *State v Globe Casket, etc., Co.*, 82 Wash. 124, 143 Pac. 878; *Daniel v Simms*, 49 W.Va. 554, 39 S.E. 690; *State v Frear*, 138 Wis. 536, 120 N.W. 216.

⁶⁸ *Robertson v Downing*, 127 U.S. 607, 8 S.Ct. 1323, 32 L.Ed. 269; *State v Rutland*, 81 Vt. 508, 71 Atl. 197. But see *State v Lancashire F. Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348.

⁶⁹ *Bate Refrigerating Co. v Sulzberger*, 157 U.S. 1, 15 S.Ct. 508, 39 L.Ed. 601; *California v Desert Water, etc., Co.*, 243 U.S. 415, 37 S.Ct. 394, 61 L.Ed. 821; *People v Higgins*, 184 Pac. 365, 67 Colo. 441; *Amos v Moseley* (Fla.) 77 So. 619; *Arnett v State*, 168 Ind. 180, 80 N.E. 153. "This court has held, and now reaffirms that it is a settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and if acted upon for a number of years, will not be disturbed except for very cogent reasons . . . ; but this rule is only applicable in a condition of things where vested rights have been acquired and where for many years the construction insisted upon has been the rule of action; and to disturb it would be to work great public and private injury and inconvenience." *Murray Hospital v Angrove*, 92 Mont. 101, 10 Pac. (2) 577, 583.

tice,⁷⁰ or where contracts have been entered into with the government in reliance on the departmental construction.⁷¹

Undoubtedly, the contemporaneous construction of executive and administrative officers, that is, the construction placed by such officers on a statute at the time of, or soon after its enactment⁷²—even though it is entitled to some weight⁷³—should not receive as much as where the departmental construction has been followed for a long time.⁷⁴ And in either case, if the legislature impliedly approves the construction of an administrative or executive officer by later legislation,⁷⁵ or fails to indicate its disapproval of such a construction when the same statute or one in *pari materia* is re-

⁷⁰ Ibid. In fact, the contemporaneous construction of the administrative or executive department will be regarded as binding on the courts if titles to property are involved. *Rogers v Goodwin*, 2 Mass. 475, or if a penalty would otherwise be imposed. *State v Northern Pac. R. Co.*, 95 Minn. 43, 103 N.W. 731. Also note *State v Southern Ry. Co.*, 122 N.C. 1052, 30 S.E. 133, 41 L.R.A. 246. And still further note *State v Highway Commission*, 132 Kan. 327, 295 Pac. 986, where official duties were not clearly defined and the officers' construction was held binding.

⁷¹ *U.S. v Alabama Great Southern R. Co.*, 142 U.S. 615, 12 S.Ct. 306, 35 L.Ed. 1134; *Whitebird v Eagle-Picher Lead Co.*, 28 Fed. (2) 200.

⁷² See § 218, *supra*, for treatment of contemporaneous construction, generally.

⁷³ *Attorney General v Newbern*, 21 N.C. 216; *Chattanooga Plow Co. v Hays*, 125 Tenn. 148, 140 S.W. 1068; *City of Richmond v Drewry-Hughes Co.*, 122 Va. 178, 90 S.E. 635, 94 S.E. 989. But note *Allen v Commissioner (Mass.)* 172 N.E. 643, 70 A.L.R. 1299, that a departmental construction cannot be considered, unless it has existed for a long time.

⁷⁴ *Emergency Fleet Corp. v Western Union Tel. Co.*, 275 U.S. 415, 72 L.Ed. 424, 48 S.Ct. 198; *Selden v National Aniline, etc., Co.*, 48 Fed. (2) 263; *State v State Highway Comm.*, 132 Kan. 327, 295 Pac. 986; *Hennepin County v Ryberg*, 168 Minn. 385, 210 N.W. 105; *Adamson v Schreiner*, 162 N.Y.S. 653, 176 Ap. Div. 95; *State v Smith*, 49 S.D. 106, 206 N.W. 233. And especially where vested rights are involved. *State v Harrison*, 116 Ind. 300, 19 N.E. 146.

⁷⁵ *U.S. v Johnson*, 124 U.S. 236, 8 S.Ct. 446, 31 L.Ed. 389; *Dollar Savings Bank v U.S.*, 19 Wall. (U.S.) 227, 22 L.Ed. 80; *State v Moore*, 50 Neb. 88, 69 N.W. 373; *State v Bryan*, 112 Neb. 692, 200 N.W. 870, and see *Leitch v Gaither*, 151 Md. 167, 134 Atl. 317; *Smith v Kelley (Va.)* 174 S.E. 842. But note *Grant v U.S.*, 41 Fed. (2) 863. The re-enactment of the construed statute will not validate an erroneous interpretation placed thereon by the administrative department. *Harrison v Landy*, 24 Fed. Supp. 535.

enacted,⁷⁶ obviously the departmental construction's probative value is further enhanced.

But under no circumstances should the interpretation placed upon a statute by an administrative or executive official alter its plain language.⁷⁷ And where consideration is given to a departmental construction, in every instance, such construction must be contemporaneous⁷⁸ consistent or uniform,⁷⁹ and of long duration,⁸⁰ if this latter requirement is prescribed in addition to its being contemporaneous, or considered a ground for giving the construction greater weight.^{80a} While the authorities differ as to the exact length

⁷⁶ *Bate Refrigerating Co. v Sulzberger*, 157 U.S. 1, 15 S.Ct. 508, 39 L.Ed. 601; *Surgart v Baker*, 229 U.S. 187, 33 S.Ct. 645, 57 L.Ed. 1143; *New York Life Ins. Co. v Burbank (Iowa)* 216 N.W. 742; *State v Schenk*, 238 Mo. 429, 142 S.W. 263.

⁷⁷ *Houghton v Payne*, 194 U.S. 88, 24 S.Ct. 590, 48 L.Ed. 888; *U.S. v Mo. Pac. R. Co.*, 278 U.S. 269, 72 L.Ed. 322, 49 S.Ct. 133; *Stewart v Wilson Printing Co.*, 210 Ala. 624, 99 So. 92; *People v Sinicrope (Calif.)* 288 Pac. 61; *People v Shedd*, 241 Ill. 155, 89 N.E. 332; *Metrop. Life Ins. Co. v State*, 186 Ind. 407, 116 N.E. 579; *State ex rel Cobb v Thompson*, 319 Mo. 492, 5 S.W. (2) 57; *Southern Surety Co. v Standard Slag Co.*, 117 Ohio St. 512, 159 N.E. 559; *Burke v Burkhart*, 42 S.D. 604, 176 N.W. 743; *Price-Bass Co. v McCabe*, 161 Tenn. 67, 29 S.W. (2) 249; *Jones v Marrs*, 114 Tex. 62, 263 S.W. 570; *State v Smith*, 184 Wis. 455, 200 N.W. 65. And this is true, no matter how long the administrative construction has been followed. *Louisville, etc., R. Co. v U.S.*, 282 U.S. 740, 51 S.Ct. 297, 75 L.Ed. 672.

⁷⁸ *U.S. v Briebach*, 245 Fed. 204. "We do not think, however, that these facts are sufficient. In the first place, the law is of state-wide application. Its application is not controlled by the practice in one county." *Nye v Board of Comrs.*, 36 N.M. 169, 9 Pac. (2) 1023, 25.

⁷⁹ *U.S. v Healey*, 160 U.S. 136, 16 S.Ct. 247, 40 L.Ed. 369; *U.S. v Mo. Pac. R. Co.*, 278 U.S. 269, 72 L.Ed. 322, 49 S.Ct. 133; *Stephen v Lail*, 80 Colo. 49, 248 Pac. 1012; *McCann v Retirement Board*, 331 Ill. 193, 162 N.E. 859; *Luce v Rogers*, 181 Mich. 599, 148 N.W. 381; *Gray v Foster*, 92 N.D. 7, 46 Ind. Ap. 149; *State v Jay*, 37 Wyo. 189, 260 Pac. 180.

⁸⁰ *Orchard v Alexander*, 157 U.S. 372, 15 S.Ct. 635, 39 L.Ed. 737; *Central Elevator Co. v People*, 174 Ill. 203, 51 N.E. 254, 43 L.R.A. 658; *Allen v Elkhorn Coal Corp.*, 208 Ky. 108, 270 S.W. 743; *State v Globe Casket, etc., Co.*, 82 Wash. 124, 143 Pac. 878.

^{80a} For instance, where an act was passed in 1906 and no attempt was made until 1920 by the department to adopt the construction now urged, such construction was held entitled to little weight. *U.S. v Manzi*, 16 Fed. (2) 884.

of time essential to meet the test of long duration,⁸¹ a period as short as five years seems to have been sufficient.⁸²

§ 220. **Some Illustrative Cases.**—An examination of several typical cases will further reveal the part played by executive or administrative officers in the interpretative process. Thus, in *Ernst v Kootros* (196 Wash. 138, 82 Pac. (2) 126), where the director of the Department of Social Security construed the definition of the State Unemployment Act that “an employing unit” was one having “eight or more” individuals in its employ, and an “employer” as an employing unit having in its employment “eight or more” individuals, to read “one or more”, the court held that such a construction was an arbitrary usurpation of legislative authority, since the meaning of the act was plain and unequivocal, and the court would not accept it, even though made or indulged in by the executive or administrative officers administering the law. But where the statute in question was actually ambiguous, the force of an administrative construction vividly appears in *State v Standard Oil Company* (190 La. 338, 182 So. 531):

“The clause of the statute allowing dealer 3 per cent deduction to cover losses in handling gasoline is not clear nor free from ambiguity. It is somewhat confusing . . . For that reason, the state’s administrative officers were called upon to interpret its meaning. The requested interpretation or construction was promptly given, accepted by the dealers without question and in practice has been followed ever since.

“Because of the construction consistently given this statute by the administrative officers whose duty it is, and has always been, to enforce it; because of the repeated re-enactments of the original act without change, and because of the judicial sanction given it, the construction put upon it should not be overturned now so as to affect past transactions unless manifestly wrong.”

Similarly, in *Decker v New York Life Insurance Co.* (94 Utah 166, 76 Pac. (2) 568), where the state insurance authorities had,

⁸¹ *White v Atkins* (C.C.A.—Mass.) 3 Fed. Sup. 694 (10 years); *Central R. Co. v Martin*, 114 N.J.L. 69, 175 Atl. 637 (50 years); *Saville v Richmond* (Va.) 172 S.E. 828 (100 years); *Pittsburg, etc., R. Co. v Hoffman*, 200 Ind. 178, 162 N.E. 403 (25 years); *Dick v Murphy*, 219 N.Y.S. 259, *aff’d* 245 N.Y. 88, 156 N.E. 625 (15 years).

⁸² *Duke Power Co. v South Carolina Tax. Comm.* (C.C.A.—S.C.) 81 Fed. (2) 513.

for a long time, permitted the issuance of life policies containing an option to surrender after default, such practice was persuasive as an administrative construction of the insurance statute in favor of the propriety of such options.

§ 221. Construction by the Executive Department Analyzed.

—Of course, the construction placed upon a law by the executive department is not the law of the statute but only evidence of what the law is. It is simply an aid to which the courts may resort in their efforts to ascertain the legislative intent. It may be set forth as an argument or a reason for the acceptance of a certain construction, for where the executive places a certain interpretation upon a law, that fact would seem to indicate that that interpretation represents the legislative will. At least, the interpretation given the statute by the executive officer would seem to be the obvious one and therefore the one actually intended by the lawmakers. But to give the construction placed upon a law the power to control the court in its interpretation thereof, would clearly vest legislative, if not judicial power, in the executive department.

As we have already pointed out, where the executive construction has been followed for a long time, an element of estoppel seems to be involved. Naturally, many rights will grow up in reliance upon the interpretation placed upon a statute by those whose duty it is to execute it. Often grave injustices will result should the courts reject the construction adopted by the executive department. But actually, in many cases of this type, that is, in those where the executive construction does not actually give the legislative intent effect, the officials who administer the law exercise legislative or judicial power, or both. Practical considerations and considerations of justice, however, seem of more importance in these instances than a strict adherence to the tripartite theory of government.

“If we entertained any doubt upon the subject, we would incline to uphold the legislation for this reason: Soon after the code went into effect, the question arose whether Section 3657, *supra*, was operative. The Attorney-General of the state was of the opinion that it had been effectively repealed by the act in question, and so instructed the county attorneys throughout the state. His successors in office have been of the same opinion, all having given written opinions to that effect. For this reason, the county attorneys have refrained from instituting prosecutions. — The result is that many marriages have been

contracted during the 19 years intervening—the validity of all of which, if we should reach a contrary view, would be brought in question.” *State ex rel Cotterer v Dist. Court (Mont.)*, 140 Pac. 732.

It is doubtful whether any case presents a better argument in favor of adherence to the construction adopted by the officers whose duties consist in administering the statute, than does *Hennepin County v Ryberg* (168 Minn. 385, 210 N.W. 105, 107), where the court went so far as to recognize that it might be proper to refuse to overturn an executive construction which the court admitted constituted an erroneous construction:

“So if we were now to adopt the view that the law is, and, since 1906, has been, that the fees in question belong not to the clerks but to the counties, we would be overturning a settled conviction as to what the law is which has prevailed throughout the executive departments of the state government for 20 years and has been once concurred in by the judicial department. There was a clear ambiguity to start with, a patent uncertainty under state law of the effect of the declaration of congress that the clerks of state courts might retain the fees, which has been subjected to the practical construction and settled opinion just referred to. It would be utterly presumptuous for the courts at this day, even though they might have reached a contrary opinion to start with, to disagree with that conviction, settled and effective for twenty years. Such a judicial reversal of settled executive opinion and policy would be particularly objectionable in view of this clear approval by the legislative department, expressed not only by acquiescence but also by explicit recognition and confirmation. For judges to reverse or nullify such a clear executive and legislative decision of such long standing would be to destroy confidence not only in the certainty of law but in official action thereunder. That is one of the disastrous results frequently prevented by the doctrine of practical construction. It is a rule of such clear sanity and practical wisdom that it may control the construction of constitutions as well as statutes.”

But the dissenting judge did not think this case a proper one in which to regard the practical construction as controlling:

“I dissent because:—If there was a silent, unconscious acquiescence, no one was misled. It is not like a case where property rights or titles are affected and practical construction is invoked to protect innocent acts. Here the official is merely keeping money not his.”

Of course, an attempt to justify the encroachment of the executive department upon the legislature on grounds of justice and practical wisdom does not dispose of the problem. Perhaps this is one of those instances where the tripartite theory falls down. Maybe there is no answer to the accusation that to follow the construction placed upon a law by the executive department of government, is to allow the executive to legislate. Yet, where the legislature has met since the executive department placed its interpretation on a given statute, its failure to indicate that the executive construction is not actually in accord with the legislative intent, may well be considered as an implied ratification, and especially so where the legislature has met frequently since the executive interpretation first was made and applied. In a general way, this inaction of the lawmakers may be regarded as their approval of the construction adopted by the administrative officials. This silent legislation may be of a sufficient calibre to remove the objection that where the courts adopt a construction of the executive department which does not accord with the legislative intent existing at the time the statute involved was enacted, they exercise legislative power.

Any number of cases may be found wherein the principle of ratification by the legislature was recognized and applied. A good statement of the principle is found in *State v Standard Oil Co.* (190 La. 338, 182 So. 531) :

“The re-enactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed.”

A similar statement will be found in *United States v Ickes* (98 Fed. (2) 271, 280) :

“Therefore, with full knowledge of the departmental rulings and of the consequences thereof, Congress nevertheless modified that ruling in part only.—If it cannot be said that by thus passing the act, Congress finally determined the law, at least it must be said that Congress gave strong evidence of approval of the Secretary’s rulings to the extent that it omitted to modify the same. The failure of Congress to amend a statute, after administrative ruling have been made construing or applying it, has been recognized as evidence of congressional approval of such rulings.”

§ 222. **Construction by the Bar.**—While the principles discussed in the preceding section will also apply to the contemporaneous construction by the bar, because of the peculiar knowledge of lawyers and their close connection with statutory law, it would seem logical that considerable weight should be given by the court to the construction placed by the bar upon ambiguous statutes. In fact, the decisions seem to support this conclusion. Thus, in *Smith v Southern Pacific Co.* (50 Nev. 377, 262 Pac. 935, 36), the court in announcing that it would not overthrow a construction uniformly adopted by the bench and bar for many years, unless contrary to the legislative intent, said:

“To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most favorable nature. The practical exposition is too strong and obstinate to be shaken or controlled. . . . The question is at rest and ought not now to be disturbed.”

A similar view was taken by the court in *Mesar v Milwaukee Elec. Ry. & Light Co.* (197 Wis. 578, 222 N.W. 809) where the long acquiescence of the legal profession and the supreme court in the construction of a statute providing for the survival of causes of action led the court to follow such construction and say:

“It has apparently been universally assumed by the profession that causes of action survive by virtue of the statute. It has frequently been so assumed, if not expressly or impliedly held, by this court. . . . The legislature has long acquiesced in the views which this court has thus taken of this statute. If we entertained doubt that this view was the correct construction of the statute, the universal acquiescence in such construction on the part of the profession, the court, and the legislature would constitute weighty objection to the construction contended for by the appellant.”

And in *Shields v Williams* (159 Tenn. 349, 19 S.W. (2) 261, 265), the court also indicated that the construction given a statute by the legal profession was entitled to considerable weight:

“Counsel for complainants insists that their construction of the income tax clause . . . is supported by the opinion of the profession long entertained and by contemporary and subsequent legislative interpretation. The views of the legislature

and of the profession on a matter of this character are, of course, entitled to much deference; but our judgment cannot be so controlled."

Moreover, the United States Supreme Court in *Stuart v Laird* (1 Cranch. 299, 2 L.Ed. 115), an early case, adhered to a practical construction placed upon a federal statute pertaining to the federal judiciary.

"Another reason for reversal is, that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

And the construction placed upon a statute by the attorney general of the state has often been regarded as a valuable source of assistance in ascertaining the true meaning of an ambiguous statute. Such was the case in *Central Pacific Railway Co. v. Tax Commission* (3 Fed. Supp. 929):

"While the interpretation of state statutes is the peculiar province of the state courts, the contention of the attorney general respecting the construction of a state statute is at least persuasive."

Such was also true in *Tyler v Texas Employers' Insurance Association* (— Tex. —, 288 S. W. 409, 411):

"While the opinions of the attorney general of the state are not controlling with the court, yet they are very persuasive. Especially, so in this instance, where we are of the opinion the reasoning is sound and the conclusions just."

It would also seem unobjectionable to give more weight to the construction placed upon a statute by the attorney general, or for that matter by any other of the executive department who is a lawyer and whose duties fall within the realm of that profession, than to any other administrative official, because of his special training and the closeness of his connection with the statute law of the state.

§ 223. **Legislative Construction.**—Where the meaning of a statute is in doubt,⁸³ if the legislature has indicated its construction of the language in question in other statutes where it has used the same language, the court may properly resort to such legislative construction for assistance.⁸⁴ Such construction, however, is not binding on the courts.⁸⁵ It is, nevertheless, entitled to some weight, even if only of a persuasive nature.⁸⁶ Where, however, the construction of the legislature is contemporaneous,⁸⁷ and especially where it has existed for a long time,⁸⁸ it is entitled to considerable weight. Neither is a legislative construction of this nature conclusive on the

⁸³ *Caminetti v U.S.*, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192; *Walker v U.S. (C.C.A.—Minn.)* 83 Fed. (2) 103; *Ingalls v Cole*, 47 Me. 530; *State ex rel Cobb v Thompson*, 319 Mo. 492, 5 S.W. (2) 57; *Common. v Warwick*, 17 Pa. Co. 65.

⁸⁴ *Bailey v Clark*, 21 Wall. (U.S.) 284, 22 L.Ed. 651; *Gibson v People*, 44 Colo. 600, 99 Pac. 333; *Cutrona v City of Wilmington*, 14 Dela. Ch. 208, 124 Atl. 658; *Yarlott v Brown*, 192 Ind. 648, 138 N.E. 17; *State v Parsons*, 206 Iowa 390, 220 N.W. 328; *In re Hurle*, 217 Mass. 223, 104 N.E. 336; *State ex inf. Gentry v Long-Bell Lumber Co.*, 321 Mo. 461, 12 S.W. (2) 64; *State v Erickson*, 75 Mont. 429, 244 Pac. 287; *People v Davenport*, 91 N.Y. 574; *Drainage Commrs. v Davis*, 182 N.D. 140, 108 S.E. 506; *Belau v Buss*, 48 S.D. 595, 205 N.W. 669; *Shields v Williams*, 159 Tenn. 349, 19 S.W. (2) 261; *Creager v Hidalgo County, etc., Dist. (Tex. Com. Ap.)* 283 S.W. 151; *State v Herr*, 151 Wash. 623, 276 Pac. 870.

⁸⁵ *American Exchange Securities Corp. v Helvering (C.C.A.)* 74 Fed. (2) 213; *Becker v Detroit Sav. Bank*, 269 Mich. 432, 257 N.W. 853; *Shields v Williams*, 159 Tenn. 349, 19 S.W. (2) 261. But see *Prudential Ins. Co. v Patten*, 140 Kan. 708, 38 Pac. (2) 143, that it is binding in all cases arising subsequent to such legislative interpretation.

⁸⁶ *Spencer v U.S.*, 169 Fed. 562, 95 C.C.A. 60; *Village of Morgan Park v Knopf*, 210 Ill. 453, 71 N.E. 340; *Middleton v Greeson*, 106 Ind. 18, 5 N.E. 755; *State ex rel Schenck v Board of Comrs.*, 83 Kan. 199, 110 Pac. 92; *Robertson v Baxter*, 57 Mich. 127, 23 N.W. 711; *Crohn v Kansas City Home Tel. Co.*, 131 Mo. Ap. 313, 109 S.W. 1068; *State v Erickson*, 75 Mont. 429, 244 Pac. 287.

⁸⁷ For contemporaneous construction, generally, see § 218, *supra*.

⁸⁸ *People v Southern Pac. Co.*, 209 Calif. 578, 290 Pac. 25; *Sarlls v State*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718; *Glasco v State Election Board*, 121 Okla., 119, 248 Pac. 642; *Walker v Polk County*, 110 Ore. 535, 223 Pac. 741; *State v Nashville Baseball Club*, 127 Tenn. 292, 154 S.W. 1151.

court, for to give it such a status would clearly constitute an encroachment upon the judiciary.⁸⁹

Nevertheless, the legislature frequently, through the use of general interpretation clauses⁹⁰ or declaratory statutes,⁹¹ prescribes rules of construction or explains or construes existing statutes. These devices are important factors in the construction of statutes and are treated elsewhere in considerable detail. Suffice it at this point to state that the legislative interpretation is entitled to respectful consideration,⁹² and while not always controlling on the courts,⁹³ is highly persuasive.⁹⁴ To summarize, the rule would seem to be—and properly—the same whether the legislative interpretation is made by an interpretation clause, or by implication through an approval by the re-enactment or retention of an existing statute which has been judicially construed or given a contemporaneous construction.

But there is some danger attached to giving great weight to previous constructions placed by prior legislatures upon words and phrases. The characters of the prior and later statutes are impor-

⁸⁹ *Roche v Jordan*, 175 Fed. 234; *Gibson v People*, 44 Colo. 600, 99 Pac. 333; *Village of Morgan v Knopf*, 210 Ill. 453, 71 N.E. 340; *Bettenbrock v Miller*, 185 Ind. 600, 112 N.E. 771; *State v Dana*, 138 Iowa 244, 115 N.W. 1115; *Marburg v Mercantile Bldg. Co.*, 154 Md. 438, 140 Atl. 836; *Frey v Michie*, 68 Mich. 323, 36 N.W. 184.

⁹⁰ For further treatment of such clauses, see *supra*, §§ 92 and 208.

⁹¹ For additional discussion of declaratory statutes, see §§ 92 and 208, *supra*.

⁹² *Interstate Life & Acc. Ins. Co. v Hunt (Tenn.)* 100 S.W. (2) 987, reh. den. 102 S.W. (2) 55.

⁹³ *Maryland Theatrical Corp. v Trust Co.*, 157 Md. 602, 146 Atl. 805. But see *Stephens County v Hefner*, 118 Tex. 397, 16 S.W. (2) 804, that although the legislative interpretation of an act is entitled to weight, where it is an interpretation made by the very legislature which passed the act, it should be of controlling effect. On the other hand, an interpretation placed on the act of one legislature by a subsequent legislature, while persuasive, is not absolutely binding on the court. *Cherry v Magnolia Petro. Co. (Tex.)* 45 S.W. (2) 55, *aff'd* 24 S.W. (2) 549.

⁹⁴ *Drainage Dist. v Hetlage (Mo.)* 102 S.W. (2) 702; *Caples v Cole (Tex.)* 102 S.W. (2) 173. That it is entitled to "great weight," see *Hesse v Rath*, 230 N.Y.S. 676, 224 Ap. Div. 344, *aff'd* 249 N.Y. 436, 164 N.E. 342. But a legislative construction of an enactment of another legislature is entitled to "little weight," see *Federal Crude Oil Co. v Yount-Lee Oil Co.*, 122 Tex. 21, 52 S.W. (2) 56. Nor will the re-enactment of the construed act necessarily validate an erroneous prior administrative interpretation. *Harrison v Landy*, 24 Fed. Supp. 535.

tant considerations. Even where the two laws involve the same general subject matter, the subsequent legislature may have had a different meaning in mind. The two legislatures will generally be composed of different members. Words also change in meaning as time marches on. And as a matter of fact, a subsequent legislature will generally have no actual knowledge of the meaning previously accorded to a given word or expression. Consequently, the weight to be given to a previous construction must necessarily depend upon the strength of the indication that the legislature has again used the word in the same sense. At best, a former meaning, in most instances, can only persuasively indicate that the same word in a subsequent enactment should be given the same meaning.

§ 224. Judicial Construction.—The construction placed upon a statute by an inferior court is entitled to consideration by the court of last resort,⁹⁵ and, if such a construction has been acquiesced in for a long period of time,⁹⁶ and particularly where a refusal would result in hardship,⁹⁷ the superior court should depart from the inferior court's construction with considerable hesitancy. And after a construction has been adopted by the highest court, it becomes a part of the statute itself,⁹⁸ and remains so as long as it is not overruled.⁹⁹

Moreover, so far as words and phrases are concerned, if they have been previously interpreted by the courts, it will be presumed

⁹⁵ *Wilson v People*, 44 Colo. 608, 99 Pac. 335. And see Note, 36 Harv. L.Rev. 890. Similarly, the interpretation placed on a rule by the court adopting it, will be followed. *Edgington Coal Co. v Wagner*, 100 W.Va. 117, 130 S.E. 94. For practical construction of rule by clerk, see *St. Louis, etc., R. Co. v Spiller*, 275 U.S. 156, 72 L.Ed. 214.

⁹⁶ *Auditor v Cain*, 22 Ky. L. 1888, 61 S.W. 1016; *Plummer v Plummer*, 37 Miss. 185.

⁹⁷ *Van Loon v Lyon*, 4 Daly (N.Y.) 149, rev. on other grounds, 61 N.Y. 22.

⁹⁸ *Douglass v Pike County*, 101 U.S. 677, 25 L.Ed. 968; *Great Atlantic & Pac. Tea Co. v Scanlon*, 266 Ky. 785, 100 S.W. (2) 223; *State v Mo. Athletic Club*, 261 Mo. 576, 170 S.W. 904; *Eau Claire Nat. Bank v Benson*, 106 Wis. 624, 82 N.W. 604. Also see § 184, *supra*.

⁹⁹ *Roos v City of Mankato (Minn.)* 271 N.W. 582. And for a case involving a statute framed from a judicial decision, see *Calhoun v Little*, 106 Ga. 336, 32 S.E. 86, 43 L.R.A. 630. Even obiter dicta long acquiesced in may become law: "When a determination, even though obiter, has stood so long (here since 1897) without challenge, it is the settled policy of the law to treat the rule thus laid down as one which the courts will generally accept and not disturb. 'Optimus legis interpres consuetudo'."

that the legislature, when they were used in a later enactment, intended to use them with the same meaning that the court had already given to them,¹⁰⁰ unless, of course, it was clearly evident from the later statute that a different meaning was intended.¹⁰¹ For instance, a judicial construction will be approved, if the statute so construed, is later re-enacted without alteration.¹⁰² Similarly, an acquiescence in a statute's construction as declared by the court will also arise when the legislature permits the old statute to stand without change,¹⁰³ especially for any great length of time.¹⁰⁴ This continued use of the same language on the part of the legislature indicates that the court's construction is in accord with its intent,¹⁰⁵ otherwise it would have used new or different language.¹⁰⁶ In fact, it is to be

¹⁰⁰ *In re Moffit's Estate*, 153 Cal. 359, 95 Pac. 653; *Shehan v Louisville*, etc., R. Co., 125 Ky. 478, 101 S.W. 380; *Silverman v Rappaport*, 300 N.Y.S. 76; *Daniel v Simms*, 49 W.Va. 554, 39 S.E. 690. "It is also to be noted that the act of 1932 was passed after the decision in the *Hobbie Grocery Co.* case, *supra*, in which the terms used to describe the capacity of the truck were defined. It must be presumed that the legislature was aware of this and intended them to be so understood. When the act of 1932 was passed, if the legislature had intended to put carriers under it on the same basis as those under the act of 1931, it seems reasonable that in doing so they would have used language of substantially the same meaning or referred to it as controlling in that respect." *Alabama Public Serv. Comm. v Jones* (Ala.) 182 So. 452, 4.

¹⁰¹ *The Abbotsford v Johnson*, 98 U.S. 440, 25 L.Ed. 168; *State v Jones*, 91 Ark. 5, 120 S.W. 154; *Murrell v Industrial Comm.*, 291 Ill. 334, 126 N.E. 189; *Indiana Trust Co. v Griffith*, 176 Ind. 643, 95 N.E. 573; *Conservative Homestead Assoc. v Conery*, 169 La. 573, 125 So. 621; *Common. v Greenwood*, 205 Mass. 124, 91 N.E. 141; *Commercial Trust Co. v Hudson County Board*, 87 N.J.L. 179, 92 Atl. 799, aff. 86 N.J.L. 424, 92 Atl. 263; *Doty v Am. Tel. & Teleg. Co.*, 123 Tenn. 329, 130 S.W. 1053; *Nephi Plaster, etc., Co. v Juab County*, 33 Utah 114, 93 Pac. 53.

¹⁰² *Heald v Dist. of Columbia*, 254 U.S. 20, 65 L.Ed. 106, 41 S.Ct. 42; *Edwards v Wabash R. Co.*, 264 Fed. 610; *People v Bradshaw*, 303 Ill. 558, 136 N.E. 466.

¹⁰³ *Beale v U.S. (C.C.A.—Minn.)* 71 Fed. (2) 737; *Sylvan Mortgage Co. v Stadler*, 185 N.Y.S. 293, 113 Misc. 659, rev. on other ground, 188 N.Y.S. 165, 115 Mis. 311, aff'd 191 N.Y.S. 955, 199 Ap. Div. 965. Also see *Behny v Bassler*, 4 Pa. Co. 496; *State v Platt*, 154 S.C. 1, 151 S.E. 206.

¹⁰⁴ *State of Mo. v Ross* (U.S.) 57 S.Ct. 60; *McChesney v Hager*, 31 Ky. L. 1038, 104 S.W. 714; *People v Bloom*, 193 N.Y. 1, 85 N.E. 824; *Lowman, etc., Co. v Ervin*, 157 Wash. 649, 290 Pac. 221.

¹⁰⁵ *Behny v Bassler*, 4 Pa. Co. 496; *State v Platt*, 154 S.C. 1, 151 S.E. 206.

¹⁰⁶ *Tennessee Coal, Iron & R. Co. v Roussell*, 155 Ala. 435, 46 So. 866; *Hart v Hart*, 31 Colo. 333, 73 Pac. 35.

presumed that the legislature spoke with a knowledge of the case law upon the subject matter of the statute.¹⁰⁷ It may also be assumed that such construction met with legislative favor.¹⁰⁸

If a foreign statute of doubtful meaning is involved in litigation, the interpretation by the courts of the highest jurisdiction in the foreign state will be accepted by the court of the forum and applied.¹⁰⁹ Similarly, the state courts will follow the construction of federal statutes as announced by the Supreme Court of the United States,¹¹⁰ and the construction of a state's court of its own enactments will be accepted by the federal courts.¹¹¹ Consequently, in order to ascertain the law in these instances, the interpretation placed upon the statutes involved must be considered.

§ 225. Proof and Evidence of Extrinsic Aids.—The court may take judicial notice of many matters to which resort may be had when it becomes necessary to consider extrinsic matters in order to determine the meaning of a statute.¹¹² Of course, any of these

¹⁰⁷ *Wilson v Wilson* (Pa.) 191 Atl. 666.

¹⁰⁸ *Ryan v State Industrial Comm.* (Ore.) 61 Pac. (2) 426.

¹⁰⁹ *McManus v Lynch*, 28 Ap. D.C. 381; *Beckley v U.S. Savings, etc., Co.*, 147 Ala. 195, 40 So. 655; *Van Matre v Sankey*, 148 Ill. 536, 36 N.E. 628, 23 L.R.A. 665; *Lane & Co. v Watson*, 51 N.J.L. 186, 17 Atl. 117; *Blumle v Kramer*, 14 Okla. 366, 79 Pac. 215; *Blaine v Curtis*, 59 Vt. 120, 7 Atl. 708; *Schmaltz v York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522, and see *Jessup v Carnegie*, 80 N.Y. 441.

¹¹⁰ *Black v Lusk*, 69 Ill. 70; *Towle v Forney*, 14 N.Y. 423.

¹¹¹ *Cornell University v Fiske*, 136 U.S. 152, 10 S.Ct. 775, 34 L.Ed. 427; *Gatewood v North Carolina*, 203 U.S. 531, 27 S.Ct. 167, 51 L.Ed. 305. Also see *Erie Railroad Co. v Thompson*, 304 U.S. 64, 82 L.Ed. 787, 58 S.Ct. —, 114 A.L.R. 1487, overruling *Swift v Tyson* (U.S.) 16 Pet. 1, 10 L.Ed. 865.

¹¹² *Pacific Coast S. S. Co. v U.S.*, 33 Ct. Cl. (U.S.) 36; *Brown v Turner*, 174 Mass. 150, 54 N.E. 510. "Courts take judicial notice of some circumstances outside of an act which go to show its meaning, and in doing so they frequently take a wide range of illustration and investigation from public records, public documents, general and local history, and other matters of such general and public notoriety as may be supposed to have been in the minds of all the legislators when the act was passed." *Badeau v U.S.*, 21 Ct. Cl. (U.S.) 48. And note the following language in *Gardner v The Collector* (U.S.) 6 Wall. 499, 511, 18 L.Ed. 890: "Whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such a question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

matters must meet the requirements essential to the right of a court to exercise judicial knowledge in lieu of actual proof.¹¹³ Thus, matters of history,¹¹⁴ legislative journals,¹¹⁵ administrative rules and regulations,¹¹⁶ usages and customs,¹¹⁷ and the meaning of words

113 “. . . courts should take notice of whatever is or ought to be generally known, within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. This rule enumerates three material requisites: 1. The matter of which a court will take judicial notice must be a matter of common and general knowledge. The fact that the belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by everyone. Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized. 2. A matter properly a subject of judicial notice must be ‘known’, that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient notoriety attached to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said that courts must ‘judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life.’ 3. A matter to be within judicial cognizance must be known ‘within the limits of the jurisdiction of the court.’” 15 R.C.L. § 2, p. 1057-10.

114 *Blake v U.S.*, 103 U.S. 227, 26 L.Ed. 462; *Ponce v Roman Catholic Apostolic Church*, 219 U.S. 296, 28 S.Ct. 737, 52 L.Ed. 1068; *Bulpit v Matthews*, 145 Ill. 345, 34 N.E. 525, 22 L.R.A. 55; *State v Bland*, 144 Mo. 534, 46 S.W. 440; *Redell v Moores*, 63 Neb. 219, 88 N.W. 243, 55 L.R.A. 740; *Isaacs v Barber*, 10 Wash. 124, 17 S.W. 1064. Also see *In re Hamlin*, 226 N.Y. 407, 124 N.E. 4.

115 *Blake v National City Bank*, 23 Wall. (U.S.) 307, 23 L.Ed. 119; *Portland v Yick*, 44 Ore. 439, 75 Pac. 706.

116 *Bloxham v Consumers Electric Light, etc., Co.*, 36 Fla. 519, 18 So. 444, 29 L.R.A. 507.

117 *Waters-Pierce Oil Co. v Deselms*, 212 U.S. 159, 29 S.Ct. 270, 53 L.Ed. 453; *State v Consumers Power Co.*, 119 Minn. 225, 137 N.W. 1104; *Babbage v Powers*, 130 N.Y. 281, 29 N.E. 132, 14 L.R.A. 398. *Business Customs*: *Brown v Piper*, 91 U.S. 37, 23 L.Ed. 200; *Bettman v Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L.R.A. 815; *Lewis v Montgomery Supply Co.*, 59 W.Va. 75, 52 S.E. 1017.

and phrases of common use,¹¹⁸ may not necessarily need to be established through the introduction of evidence.

An excellent illustration of the manner and the extent of the court's resort to judicial notice will be found in *State ex rel Coleman v Kelly* (71 Kan. 811, 81 Pac. 450, 70 L.R.A. 450) :

“The history and conditions of the people within the jurisdiction of a court at the time of the passage of an act which it is called upon to construe for the purpose of determining its validity are familiar to a court, and its knowledge of the same should aid it in assuming the proper viewpoint from which to discover the object of the law—particularly a law of the nature of the one under consideration. The history of a state which should include the facts surrounding the enactment of its legislature and the questions therein raised upon the passage of every law of an economic nature, as well as the doings of its people and the public questions which have agitated their minds, is known by a court. If the act under consideration be one passed immediately before a court is called upon to construe it, the court is as familiar with the conditions of the people as any well-informed citizen of the state. It knows that in certain portions of the state large areas are devoted to the growing of wheat, while in other portions the farming of that cereal is not practicable. It knows that the same is true of corn and other crops. It knows that certain parts of the state require irrigation to make farming profitable, while in other parts the precipitation is generally sufficient. It knows that in certain counties large deposits of coal are found, and that in others large fields of oil and gas have been discovered. It knows the enterprises of the people of the state in a business way quite as well as it understands the agricultural conditions. It also knows those general facts concerning the public aims and interests of the state in social and economic ways which all well-informed people know, including the questions that agitated the public mind at the time this certain law was enacted and knows the history of the constitution and the reason for the adoption of certain provisions and the rejection of others.

“The court cannot divest itself of the knowledge of all these things in construing a statute of constitutional provision, even if it were disposed so to do. The consideration of this knowl-

¹¹⁸ *Brown v Piper*, 91 U.S. 37, 23 L.Ed. 200; *Sinnott v Colombet*, 107 Calif. 187, 40 Pac. 329, 28 L.R.A. 594; *State v Wilhite*, 132 Iowa 226, 109 N.W. 730; *Pennock v Fuller*, 41 Mich. 153, 2 N.W. 176. A dictionary may also be admitted for the court's assistance: *Nix v Hedden*, 149 U.S. 304, 13 S.Ct. 881, 37 L.Ed. 745; *State v Wilhite*, 132 Iowa 226, 109 N.W. 730.

edge without proof of the facts is generally termed "judicial notice", and, for the want of a better expression, it will suffice; but the term means no more than that courts, in construing the law, will bring to their aid all those facts which are known by all well-informed persons because they are matters of public concern.

"Authority for taking into consideration the history of an enactment and the conditions of the people of the state at that particular time is abundant."

Consequently, the court does not commit error in refusing to admit extrinsic evidence of matters concerning which it may properly take judicial notice:

"It is only where a statute is ambiguous or uncertain in meaning that resort may be had to extrinsic evidence to show its meaning. 59 C.J. 1037, § 615. Cases may be found where evidence was heard, as in the instant case, and we know of objection to such procedure, as extrinsic facts may bring immediately to the attention of the court the conditions confronting the legislature when the statute was enacted; but as courts are authorized to take judicial cognizance of such conditions, we do not think error can be predicated upon the refusal of the trial court to admit evidence, where, in the exercise of its discretion, such evidence is deemed unnecessary: 'Whether a seeming act of a legislature is or is not a law is a judicial question to be determined by the court and not a question of fact to be tried by a jury, even though a determination of the question may involve a finding of fact.'" *Hurt v Cooper* (Tex.), 113 S.W. (2) 929, 942.

However, where proof is required, parol evidence may, in a few instances, be admitted to explain the meaning of a statute,¹¹⁹ al-

¹¹⁹ *Garland County v Hot Springs County*, 68 Ark. 83, 56 S.W. 636; *State v Hoff* (Tex. Civ. Ap.) 29 S.W. 672. Also see *U.S. v Faber, Inc.*, 16 Ct. Cust. Ap. 467. Evidence of a member of the legislature is not admissible: *Badeau v U.S.*, 21 Ct. Cl. 48; *Barlow v Jones* (Ariz.) 294 Pac. 1106; *Ex parte Goodrich*, 160 Calif. 410, 117 Pac. 451; *Stewart v Atlanta Beef Co.*, 93 Ga. 12, 18 S.E. 981; *State v Burke*, 88 Iowa 661, 56 N.W. 180; *Abernathy v Pitt County*, 169 N.C. 631, 86 S.E. 577; *Combined Saw, etc., Co. v. Flourday*, 88 Va. 1029, 14 S.E. 976. The same is true with evidence of third persons: *Pagaud v State*, 13 Miss. 491; *Abernathy v Pitt County*, 169 N.C. 631, 86 S.E. 577; *Commonwealth Bank v Comm.*, 19 Pa. 144; *Combined Saw, etc., Co. v. Flourday*, 88 Va. 1029, 14 S.E. 976.

though some authority seems to deny its admissibility.¹²⁰ But the true rule is laid down in *North American Creamery Co. v Willcuts* (38 Fed. (2) 483, 485):

“A cardinal rule of construction is that an ambiguous statute may be viewed in the light of the conditions and circumstances surrounding its enactment, in order to obtain the viewpoint of the legislature and to understand its intention. The uncertainty in section 611, arising out of the use of the word ‘stayed’ renders the testimony as to the custom which prevailed in the office of collector of internal revenue material to the issue here, and for that reason the testimony is admitted.”

Accordingly, evidence of the common meaning of words and phrases which are used in a statutory enactment seems generally to be permissible.¹²¹ Experts may testify as to the meaning of technical words or terms which pertain to their trade, profession or occupation.¹²² Even custom, as we have already indicated, has been admitted to

¹²⁰ *Delaplane v Crenshaw & Fisher* (Va.) 15 Grat. 457. Also see *Garland County v Hot Springs County*, 68 Ark. 83, 56 S.W. 636. Of course, before evidence could be admissible, the statute should be one which requires interpretation. “The statute in question is clear and unambiguous, and leaves nothing for interpretation. The decision of the superior court to the effect that it was not subject to any other construction, and that no evidence was admissible to vary or explain the meaning so apparent, was correct.” *Hathaway v Hathaway* (R.I.) 156 Atl. 800, 801. To same effect: *Sloan’s Estate*, 7 Calif. Ap. (2) 319, 46 Pac. (2) 1007, and *Dean v Ball*, 230 N.Y. 1, 128 N.E. 897. As a result, extrinsic evidence may be referred to in order to determine what a name designates. *Washington Fire, etc., Co. v Yates (Dela.)* 115 Atl. 365. Parol evidence is also admissible to show the circumstances surrounding the law’s passage. *Mass. Institute of Tech. v Boston Society*, 218 Mass. 189, 105 N.E. 874.

¹²¹ *U.S. v Felsenthan*, 16 (U.S.) Cust. App. 15. Also see note 118, *supra*. But not what a witness understood the word to mean. *Penn Co. v Mosher*, 47 Ind. Ap. 556, 94 N.E. 1033.

¹²² *People v Borda*, 105 Calif. 636, 38 Pac. 1110; *Hockett v State*, 105 Ind. 250, 5 N.E. 178.

show the meaning of the law or of the expressions contains therein.¹²³

Nor can there be a valid objection to allowing the court to resort to dictionaries, whether they be general, legal or scientific, in order to determine the meaning of words found in a legislative enactment.¹²⁴ So also may the court properly resort to authoritative political,¹²⁵ legal¹²⁶ and scientific¹²⁷ writings for assistance, when intrinsic aids have all failed.¹²⁸ Opinions rendered by the attorney general, or by the legal head of a governmental department, may also be considered,¹²⁹ as may state papers and official documents.¹³⁰

¹²³ *North American Creamery Co. v Willcuts*, 38 Fed. (2) 483; *Gaylors Appeal*, 43 Conn. 82; *Drummond v Alfred E. Norton Co.*, 141 N.Y.S. 29, 156 App. Div. 126, aff. 213 N.Y. 670, 107 N.E. 1076. But note *Ostrander v Yokohama Specie Bank*, 153 Wash. 427, 279 Pac. 585: "It is next contended that the court should have permitted the appellant to prove by a witness offered for that purpose what the customs existing at Osaka, Japan, were as applied to the facts of this case. The evidence offered to prove the custom was rejected. If it had been received, its effect would have been to, by the proof of a custom, place a construction upon the law of Japan. For this purpose a custom cannot be proven. No decision of any court of Japan construing the law was offered, and this being true it is the duty of the courts in the jurisdiction where the trial occurs to construe the statute according to the rules applicable to the construction of a domestic statute." Also see *Delaplane v Crenshaw & Fisher* (Va.) 15 Grat. 457.

¹²⁴ *Burke v Monroe County*, 77 Ill. 610; *Dole v New England Mut. Marine Ins. Co.*, 6 Allen (Mass.) 386; *Burnam v Banks*, 45 Mo. 351; *State v Hueston*, 44 Ohio St. 1, 4 N.E. 471. Also see note 118, supra.

¹²⁵ *Pollock v Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759.

¹²⁶ *Strother v Hutchinson*, 4 Bing. (N.C.) 83. Also see *Simpson v First National Bank*, 94 Ore. 147, 185 Pac. 913, that common law precedents and discussions by text book writers of the rules of the law merchant are valuable in ascertaining the meaning of the Negotiable Instruments Act. But note *Camas Stage Coach Co. v Kozer*, 104 Ore. 600, 209 Pac. 95, 25 A.L.R. 27, that an article published in a magazine is not authority by which the court can ascertain the meaning of a statute.

¹²⁷ *Wetmore v State*, 55 Ala. 198.

¹²⁸ But note *Camas Stage Co. v Kozer*, 104 Ore. 600, 209 Pac. 95, 25 A.L.R. 27.

¹²⁹ *Read v Claypoole*, 165 Md. 250, 166 Atl. 742; *Johnson v Ballou*, 28 Mich. 379; *State v Brady* (Tex. Civ. Ap.) 114 S.W. 895; *State ex rel Sunderwith v Harper*, 225 Mo. Ap. 254, 30 S.W. (2) 1039; *State ex rel Bonsall v Chase*, 172 Wash. 243, 19 Pac. (2) 927.

¹³⁰ *Pacific Coast S. C. Co. v U.S. (U.S.)* 33 Ct. Cl. 36; *U.S. v Webster*, Fed. Case No. 16,658; *Ross v Board of Supervisors*, 12 Wis. 26; *Peo. ex rel Burr v Dana*, 22 Calif. 11.

On the other hand, the French version of the English text of a statute has been held not binding, even if admissible.¹³¹

And obviously, the legislative records may be introduced in evidence,¹³² particularly in order to show the history of the statute in the legislature, and in order to ascertain the legislative intent in those jurisdictions where the legislative intent may be shown by the debates and the reports of the committees. One case has gone so far as to permit the consideration of a copy of the minutes of the debate taken by the official stenographer of the legislature.¹³³ However, the law at the present time seems generally against the presentation of evidence by the testimony of the legislators; at least, so far as it would relate to what the legislative intention was at the

¹³¹ *State v Ellis*, 12 La. Ann. 390. Also see *supra*, § 202, for further treatment of foreign languages.

¹³² *Stout v Grant County*, 107 Ind. 343, 8 N.E. 222 (legislative journals); *State v Kelly*, 71 Kan. 811, 81 Pac. 450 (legislative journals); *Harrington v Smith*, 28 Wis. 43 (legislative committee report); but see *Delaplane v Crenshaw & Fisher* (Va.) 15 Grat. 457: "as has been remarked, if the utmost latitude of proof was allowed, if reports and journals and parol evidence of witnesses and even of the members themselves, were admitted, it would be utterly impossible in the great majority of cases to prove what the intent of the legislative body actually was; and all attempts by any kind of evidence to get at a meaning different from that embodied in the enactment would from the nature of things prove utterly vain and illusory." Also see *Bank of Pennsylvania v Common.*, 19 Pa. 144, that evidence of public embarrassment, the proclamation and message of the governor, the journals of the house of representatives, and the reports of committees should be wholly disregarded. The basis of this attitude seems to be that since the journals are not evidence of the meaning of a statute, the meaning of the statute must be ascertained from the language of the act itself and the facts connected with the subject on which it is to operate. *Southwark Bank v Common.*, 26 Pa. 446. A similar view seems to have been taken in *Sherman v Story*, 30 Calif. 253: "The result of the authorities . . . clearly is, that, at common law, whenever a general statute is misrecited or its existence denied, the question is to be tried and determined by the court as a question of law—that is to say, the court is bound to take notice of it, and inform itself the best way it can; . . . that if the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed or weakened by the journals of parliament or any less authentic or less satisfactory memorials." To like effect, see *Ex parte Wren*, 63 Miss. 512: "The court . . . held that the enrolled act . . . is the sole exposition of its contents, and the conclusive evidence of its existence according to its purport, and that it is not allowable to look further to discover the history of the act or ascertain its provisions."

¹³³ *People ex rel Fleming v Dalton* (N.Y.) 52 N.E. 1113.

time the law was passed.¹³⁴ But it would seem that the testimony of a member of the legislature might be admissible to show the history of the act, unless objected to on the ground it was not the best evidence. On the other hand, since custom and usage constitute a part of contemporaneous construction, notwithstanding that the court may surely take judicial notice of the habits and customs of the people as they pertain to the construction that they have placed upon a given statute, it is difficult to see any legitimate reason why any witness—even a member of the legislature—could not testify concerning such habits and customs, if only to assist the court in the exercise of its right to take judicial cognizance thereof.¹³⁵

§ 226. **Some Illustrative Cases.**—In *Gaylor's Appeal*,¹³⁶ the question was before the jury whether a paper purporting to be the last will and testament of the deceased was duly attested, in accord with the statute which provided: "All wills shall be in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence". On the trial the appellant offered to prove by an attorney, the practice and usage regarding the execution of wills, with respect to the witnesses thereto, signing the same in the presence of each other, for the purpose of showing what the law was. Such testimony was rejected properly:

"The construction of the statute was a matter for the court and not for the jury. In construing the statute the judge might, had he chosen to do so, have called to his aid the wisdom and experience of eminent counsel, but he was not bound to do it, and his refusal to do so is not erroneous."

North Carolina & St. Louis R. R. Co. v Carroll County,¹³⁷ is an interesting case which perhaps goes farther than many courts would. It was concerned with a contest which resolved itself into a controversy as to the meaning of the word "levee" in a tax statute. Proof was offered by the defendant to show that the word meant an

¹³⁴ *Barlow v Jones*, 37 Ariz. 396, 294 Pac. 1106. Also see *Badeau v U.S.*, 21 Ct. Cl. 48; *Delaplane v Crenshaw & Fisher (Va.)* 15 Grat. 457. But see *Moyer v Gross (Pa.)* 2 Pen. & W. 171, where the opinion of the judge, who was a member of the legislature when the statute was enacted, was considered.

¹³⁵ See § 148, *supra*, for the essentials of judicial knowledge.

¹³⁶ 43 Conn. 82.

¹³⁷ 12 Tenn. Ap. 380.

embankment to elevate a road above overflow. This evidence was objected to and the objection overruled, and the court held the word to mean a road fill or embankment. The complainant, on the other hand, insisted that the word meant an embankment to restrain water, to prevent overflow, and a space adjacent to a navigable river where vessels may land, and that neither of these purposes was possible in practice as there was no such project in the county. Law books, dictionaries, and encyclopedias were cited to support the meaning thus asserted. On appeal the court stated:

“As to the proof introduced to show this meaning contended for, complainants insist it is incompetent . . . and cannot be proved by parol. . . . The reply to this is: the rule is beyond question; the action of the . . . legislature cannot be shown by parol testimony, but where a word is used by . . . (the) general assembly which is ambiguous, the meaning can be shown, and that this is especially true where the word has meanings which if attached would make the . . . statute void nonsense, and has another meaning which would carry with it practical sense, utility and validity, that it is competent to show by parol testimony that the word was used in this latter sense.”

A case, however, which tends to restrict the court solely to the language of the statute when a question arises as to the legislative intent, and which sets forth what would seem the best argument for confining the court to the language of the statute alone, was decided a good many years ago.¹³⁸ In that case, after having introduced certain reports of committees of the house of delegates made before the act in question was passed, the defendant introduced a witness, who stated that he was a member of the general assembly when the act was passed, and that he had been a member for several years previous to that session; and then proposed to prove by such witness that the members of the assembly who had passed the act were well informed at the time, of the usage urged now by the defendant in explanation of the law. Plaintiff's objection to this evidence was sustained, and the lower court affirmed on review:

“The complaint of the exclusion of the testimony of the witness . . . admits I think of several answers. In the first place the issue was one of fact before the jury and it certainly could not be material for their purposes that they should be informed as to the state of knowledge of the legislature or of members in respect of the existence of the custom of the inspectors to

¹³⁸ *Delaplane v Crenshaw & Fisher (Va.)* 15 Grat. 457 (1860).

take the draft flour, at the time the inspection law was passed. The object, it is claimed, was to aid in the construction of the act, and if admissible at all, it was not as evidence to go to the jury, but as matter for the enlightenment of the court. . . . But, thirdly, I go further and maintain that the evidence was illegal in itself and admissible even for the consideration of the court. Without attempting to define the limits within which a court in construing a statute may properly look to extrinsic matters for the purpose of ascertaining the intention of the legislature, I cannot hesitate to say that to call witnesses to the stand for the purpose of proving that facts were known to the legislature or members thereof which may be supposed to indicate their intention in passing law, must be inadmissible. . . . Where witnesses are called to prove knowledge on the part of members of particular facts, they can perhaps only speak from the recollections of conversations with them, and thus in the grave matter of expounding a statute, a species of evidence is resorted to which upon an issue of fact is regarded as not entitled to much consideration because so liable to be misunderstood or perverted. The evils that might result from such a mode of interpreting a statute may be curiously illustrated thus: in several cases in different circuits involving the construction of the same act different members might be called as witnesses whose recollections might differ materially as to the facts supposed to be known to the legislative body, and if the construction is made to depend upon their testimony, it would be different in different cases, and yet each case might be right upon its record and contradictory judgments upon the same statute would have to be affirmed. I think the tendency of the modern decisions is to the rule that the meaning and intent of the lawmaker is to be sought for in the statute itself."

*Badeau v United States*¹³⁹ illustrates a similar view. In this case, the following interrogatories were asked the witness:

"Fifth direct Interrogatory: Please state whether or not you were a member of the House of Representatives of the United States during the session of Congress of the years 1867 and 1868, and particularly in the month of March, 1868.

"Sixth direct Interrogatory: Please state whether you had any connection with the introduction and passage by the said House of Representatives of the second section of the act entitled "An act making appropriations for the consular and diplomatic expenses of the Government for the year ending 30th of

¹³⁹ 21 Ct. Cl. 48. To like effect, see *People v Chicago Rys. Co.* (Ill.) 110 N.E. 386.

June, 1869, and for other purposes", approved March 30, 1868; and if so, state what.

"Seventh direct Interrogatory: If you have personal knowledge of the object or intention of the enactment of the said section of the said act, please state the same fully."

In sustaining the objection interposed to these questions, the court said:

"In expounding this law the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both Houses and the only mode in which that will is spoken is the act itself, and we must gather their intention from the language they used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary to the public history of the times in which it was passed. . . ."

"If the opinions of members publicly expressed at the very time when the act is under discussion, and when opportunity is given to other members to controvert them, cannot be referred to for the purpose of explaining its interpretation, how much more objectionable would it be to admit the private opinions of individuals to be subsequently given in evidence for that purpose."

"How Mr. Washburne could possibly have 'personal knowledge of the object or intention of the enactment' by both Houses of Congress is not easy to comprehend. At most he could have only personal knowledge of his own object and intention, and that would not go far toward showing the object and intention of each, or of a majority of the several hundred members of the House of Representatives and of the members of the Senate in passing the act, and of the President in approving it, each one of whom must be understood to have that object and that intention which the language, construed by the light of surrounding circumstances and the public history of the times, indicates."

If an individual member of the legislature which enacted the statute subject to construction cannot testify concerning the legislative object or purpose, then clearly a person who was not a member

cannot so testify. This view was taken by the court in *Manning v Atlantic & Y. Railway Company*:¹⁴⁰

“It is elementary learning that neither the purpose nor the opinions of those who are not members of a legislative body can be regarded as an appropriate source of information from which to discover the meaning of a legislative act.”

Nevertheless, as we have already indicated,¹⁴¹ this statement is not without limitation.

In conclusion, the general rule concerning those extrinsic matters to which the court may properly resort for assistance, seems aptly and concisely stated in a relatively recent case:¹⁴²

“But while it is the province of the courts and not the legislature, to interpret the law, the courts are not shut off from any available discussion or sources available to the legislature in order to ascertain the legislative intent.”

¹⁴⁰ 188 N.C. 648, 125 S.E. 555, 561. Also see *Tellevast v Kaminski*, 146 S.C. 225, 143 S.E. 796. And note *American Trust Co. v California-Western States Life Ins. Co. (Calif.)* 76 Pac. (2) 201: “The point is used by the defendant to introduce a comment on the statements made by the author of the statute. As nothing we have said or intend to say, is based on that author’s statement we will not pause to consider such comment. Nor will we pause to discuss the statements of legislative counsel. Counsel have not shown that either class of such statements comes within the rule which permits courts to examine the reports, published by authority of law, of legislative bodies.” L.c. 206.

¹⁴¹ See *supra*, § 213, notes 121 and 122.

¹⁴² *West et al v Sun Cab Co. (Md.)* 154 Atl. 100.

CHAPTER XXII

CONSTRUCTION WITH REFERENCE TO OTHER LAWS

- § 227. In General.
- § 228. The Common Law.
- § 229. Statutes, Generally.
- § 230. Special and General Statutes.
- § 231. Statutes in *Pari Materia*.
- § 232. The Doctrine of *Pari Materia* Analyzed.
- § 233. Re-enacted Statutes.
- § 234. Adopted Statutes.
- § 235. Exceptions, Limitations and Qualifications to the General Rule With Reference to Adopted Statutes.
- § 236. Uniform State Laws.
- § 237. The Risks Attending Construction With Reference to Other Statutes.

§ 227. **In General.**—Just as the different words, phrases and provisions of a statute should not be isolated and given an abstract meaning,¹ so the statute itself in its entirety should not be interpreted solely by reference to its own terms, but rather by reference to the other laws of the state,² and particularly to those pertaining to the same subject.³ Every statute should be regarded as a part of the whole body or system of law.⁴ Consequently, in construing a

¹ See §§ 194 and 204, *supra*.

² *Farrington v Comm'r. Internal Revenue*, 30 Fed. (2) 195, 67 A.L.R. 535; *Griswold v Griswold*, 23 Colo. Ap. 365, 129 Pac. 560; *McDougald v Dougherty*, 14 Ga. 674; *Humpries v Davis*, 100 Ind. 274; *Phoenix Third Nat. Bank v Martin*, 129 Ky. 579, 293 S.W. 1064; *Blades v Szatai*, 151 Md. 644, 135 Atl. 841, 50 A.L.R. 232; *Brooks v Fitchburg, etc., R. Co.*, 200 Mass. 8, 86 N.E. 289; *State ex rel v Schuster*, 285 Mo. 399, 227 S.W. 60; *Chappell v Lancaster County*, 84 Neb. 301, 120 N.W. 1116; *Ex parte Sifloa*, 101 N.J. Eq. 540, 138 Atl. 369; *Moss v Taylor (Utah)* 273 Pac. 515; *State v Ross*, 62 W.Va. 7, 57 S.E. 284. "At first reading this statute may appear plain enough. But it must be studied, because practically it must be applied in connection with other statutes of this state. All criminal laws are necessarily enacted to remedy some evil existing or anticipated." *Common. v Barney*, 115 Ky. 475, 74 S.W. 181.

³ *Common. v Martin*, 17 Mass. 359. Even those which are unconstitutional. *Baird v Hutchinson*, 179 Ill. 435, 53 N.E. 567.

⁴ *Palmer v Inhabitants of Summer (Me.)* 177 Atl. 711; *Haggett v Hurley*, 91 Me. 542, 40 Atl. 561, 41 L.R.A. 362.

statute, the constitution,⁵ the common law,⁶ and other statutes,⁷ particularly those in *pari materi*⁸ and those expressly referred to,⁹ should be examined, in the effort to ascertain the intention of the legislature. Then, too, the legislature is presumed to have known the condition of the law in existence whenever a given statute was enacted.¹⁰ As a result, even judicial decisions must be taken into consideration.¹¹ Moreover, there is also a presumption that the legislature did not intend to overthrow legal principles which have been in existence for a long period of time,¹² in the absence of a contrary intent clearly expressed in the statute.¹³ In other words, any statute which requires construction should be construed to be in harmony with existing law. This is a basic principle of construction.

It is also interesting to note, in connection with this chapter, the historical method of interpretation. Apparently, this method is pre-eminentlly concerned with pre-existing law. According to Dean Pound, "code provisions are assumed to be in the main declaratory of the law as it previously existed; the code is regarded as a continuation and development of pre-existing law . . . all exposition of

⁵ *Wines v Garrison*, 190 Calif. 650, 214 Pac. 56, 26 A.L.R. 1302; *State v Johnson*, 71 Fla. 363, 72 So. 477; *Lehigh Portland Cement Co. v McLean*, 149 Ill. Ap. 360, aff. 245 Ill. 326, 92 N.E. 248; *Common. v International Harvester Co.*, 131 Ky. 551, 115 S.W. 703; *State v Reusswig*, 110 Minn. 473, 126 N.W. 279; *Hannibal Trust Co. v Elzea*, 315 Mo. 485, 286 S.W. 371; *St. George v Hardie*, 147 N.C. 88, 60 S.E. 920; *Overton v State*, 7 Okla. Cr. 203, 114 Pac. 1132, 123 Pac. 175; *Webb v Ritter*, 60 W.Va. 193, 54 S.E. 484. If a state law is subject to construction, the federal constitution should also be considered. *Common. v Gagne*, 153 Mass. 205, 26 N.E. 449, 19 L.R.A. 442; *Standard Oil Co. v State*, 117 Tenn. 618, 100 S.W. 705.

⁶ See § 228, *infra*.

⁷ *Chicago, etc., R. Co. v Doyle*, 258 Ill. 624, 102 N.E. 260; *St. Louis v Howard*, 119 Mo. 41, 24 S.W. 770. Even federal acts must be considered, although the statute to be interpreted is a state statute. *In re Standard Oil Co. v State*, 117 Tenn. 618, 100 S.W. 705.

⁸ See § 231, *infra*.

⁹ See § 229, note 37, *infra*.

¹⁰ *In re McKensie*, 142 Fed. 383; *Ensley v State*, 172 Ind. 198, 88 N.E. 62; *Buzz v Muncey Cartage Co.*, 248 Mich. 64, 226 N.W. 836; *Little v Bowers*, 48 N.J.L. 370, 5 Atl. 173; *State v Southern R. Co.*, 145 N.C. 495, 59 S.E. 570.

¹¹ *In re Moffitt*, 153 Calif. 359, 95 Pac. 653.

¹² *St. Louis v Delk*, 158 Fed. 931; *In re Garcelon*, 104 Calif. 570, 38 Pac. 414, 32 L.R.A. 595; *Haggett v Hurley*, 91 Me. 542, 40 Atl. 561, 41 L.R.A. 362.

¹³ *Barber v Barber*, 151 N.Y.S. 1064, 89 Misc. 519. Also see cases under note 12, *supra*.

the code and of any provision thereof must begin by an elaborate inquiry into the pre-existing law and the history and development of the competing juristic theories among which the framers of the code had to choose".¹⁴ And, of course, the court must utilize this method of interpretation to some extent when it is called upon to construe amended, re-enacted, and adopted acts, or any other enactment whose construction depends upon pre-existing law.

§ 228. The Common Law.¹⁵—If a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted.¹⁶ This is the rule whether the statute is simply declaratory of the common law,¹⁷

¹⁴ Pound, *Enforcement of Law* (1908) 20 Green Bag, 401. "Sometimes historical interpretation is used as an aid of grammatical and of logical interpretation. Historical interpretation generally may serve to give a reliable picture of the causes and circumstances surrounding new legislation, but, standing alone, it cannot control the *litera legis*. Legislation may arise from an existing need, but it may also attempt to anticipate a future need." Kocourek, *An Introduction to the Science of Law*, § 41, p. 200.

¹⁵ The common law of England, in so far as it is applicable to conditions here, *Van Ness v Pacard*, 2 Pet. (U.S.) 137, 7 L.Ed. 374; *Cooper v Seaverns*, 81 Kan. 267, 105 Pac. 509; *Reno Smelting, etc., Works v Stevenson*, 20 Nev. 269, 21 Pac. 317, 4 L.R.A. 60, except as it has been repealed or modified, is a part of the legal system of this country. *Van Ness v Pacard*, supra; *Margburg v Cole*, 49 Md. 402; *State v Mays*, 57 Wash. 540, 107 Pac. 363. This law was a part of the legal systems of the thirteen original states. But in those states which constituted the territory of the Louisiana Purchase, the common law became a part of their jurisprudence by adoption. Such an adoption has also taken place in other states, sometimes by statute, and sometimes by constitutional provisions. Also see § 355, *infra*.

¹⁶ *U.S. v Sischo*, 262 Fed. 1001, rev. on other grounds, 262 U.S. 165, 43 S.Ct. 511, 67 L.Ed. 925; *State v Donovan*, 28 Dela. 40, 90 Atl. 220; *National Fire Ins. Co. v Goggin*, 267 Mass. 430, 166 N.E. 758; *State v Wolfer*, 318 Mo. 1068, 2 S.W. (2) 589; *Waters v Gerard*, 189 N.Y. 302, 82 N.E. 143; *Keister's Adm. v Keister's Executors*, 123 Va. 157, 96 S.E. 315, 1 A.L.R. 439. Also note *State ex rel Morris v Sullivan*, 81 Ohio St. 79, 90 N.E. 146, and *State v Central Vermont R. Co.*, 81 Vt. 459, 71 Atl. 193.

¹⁷ *Cumberland Tel. etc., Co. v Kelly*, 160 Fed. 316; *Miles v State*, 189 Ind. 691, 129 N.E. 10; *U.S. Building & Loan Ass'n v Burns*, 51 Nev. 402, 4 Pac. (2) 703; *People v Miller*, 202 N.Y. 618, 96 N.E. 1125; *Hallen v Martin*, 40 S.D. 343, 167 N.W. 314. And see *Campbell v Fourth Nat. Bank*, 137 Ky. 555, 126 S.W. 114, where uniform state laws were held declaratory of the common law.

or whether it abrogates, modifies or alters it in any way.¹⁸ And there is a presumption that the law-makers did not intend to abrogate or alter it in any manner,¹⁹ although where the intention to alter or repeal is clearly expressed, it must be given effect by the courts.²⁰ Even where this intention appears, there is a further presumption that the law-makers did not intend to alter the common law beyond the scope clearly expressed,²¹ or fairly implied.²² In fact, it may be set down, as a general rule, that a statute in derogation of the common law shall be strictly construed,²³ although in some states this rule has been changed by statute.²⁴ Other states will apply the

¹⁸ *St. Louis, etc., R. Co. v Delk*, 158 Fed. 931; *Perry v Strawbridge*, 209 Mo. 621, 108 S.W. 641; *Riggs v Palmer*, 115 N.Y. 302, 82 N.E. 143; *Reeves v Russell*, 28 N.D. 265, 148 N.W. 654; *Standard Oil Co. v State*, 117 Tenn. 618, 100 S.W. 705. Also see *Common. v Hays (Mass.)* 14 Gray 62.

¹⁹ *Lutz v State (Md.)* 172 Atl. 354; *Blandfield v Blandfield*, 117 Mich. 80, 75 N.W. 287; *Perry v Strawbridge*, 209 Mo. 621, 108 S.W. 641; *Tinsman v Belvidere Dela. R. Co.*, 26 N.J.L. 148; *Woolcott v Shubert*, 217 N.Y. 212, 111 N.E. 829; *State v Sullivan*, 81 Ohio St. 79, 90 N.E. 146; *State v Hildreth*, 82 Vt. 382, 74 Atl. 71.

²⁰ *U.S. v Matthews*, 173 U.S. 381, 19 S.Ct. 413, 43 L.Ed. 738. Also see *Barrentine v State (Ark.)* 108 S.W. (2) 784.

²¹ *Blandfield v Blandfield*, 117 Mich. 80, 75 N.W. 287, 40 L.R.A. 757; *Reeves v Russell*, 28 N.D. 265, 148 N.W. 654. Note also, *Shaw v North Penn. R. Co.*, 101 U.S. 557, 25 L.Ed. 892; *Kidd v Bates*, 120 Ala. 79, 23 So. 735; *State v Grymes*, 65 W.Va. 451, 64 S.E. 728; *Rosin v Lidgerwood Mfg. Co.*, 86 N.Y.S. 49, 89 Ap. Div. 245; *Irwin v Rogers*, 91 Wash. 284, 157 Pac. 690. This rule was applied in *State v Mitchell*, 202 N.C. 439, 163 S.E. 581, where a statute relating to the grand jury's territorial jurisdiction was held not to modify the common law beyond cases of doubt regarding the county wherein the offense occurred.

²² *Schwartz v Inspection Gold Mining Co.*, 15 Fed. Supp. 1030; *Hazzard v Alexander (Dela.)* 178 Atl. 873.

²³ *Thompson v Thompson*, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180; *Arms v Ayer*, 192 Ill. 601, 61 N.E. 851, 58 L.R.A. 277; *State v Pence*, 173 Ind. 99, 89 N.E. 488; *Miller v Detroit*, 156 Mich. 630, 121 N.W. 490; *Asbury v Albemarle*, 162 N.C. 247, 78 S.E. 146; *Kellar v James*, 63 W.Va. 139, 59 S.E. 939; *Pearson v Greenfield School Dist.*, 144 Wis. 620, 129 N.W. 940; *Psota v Long Island R. Co.*, 246 N.Y. 388, 159 N.E. 180, 62 A.L.R. 1163; *Devers v Scranton*, 308 Pa. 13, 161 Atl. 540, 85 A.L.R. 692; *Strother v Lynchburg Trust, etc.*, Bank, 155 Va. 826, 156 S.E. 426, 73 A.L.R. 166. Also see § 248, *infra*.

²⁴ *In re Crutcher*, 61 Calif. Ap. 481, 215 Pac. 101; *Sutton v Sutton*, 87 Ky. 216, 8 S.W. 337; *State v Howatt*, 109 Kan. 376, 198 Pac. 686, 25 A.L.R. 1210; *Hayden v Hayden*, 107 Neb. 806, 186 N.W. 972, 25 A.L.R. 305; *Darby v Heagerty*, 2 Idaho (Hasb) 282, 13 Pac. 85; *In re Garr's Estate*, 31 Utah 57, 86 Pac. 757; *Berry v Powell*, 47 Tex. Civ. Ap. 599, 105 S.W. 345. But see *Bostac v Workman (Mo.)* 31 S.W. (2) 218.

rule only when certain types of statutes are involved.²⁵ In accord with the general rule, however, statutes pertaining to statutes in derogation of the common law apply to statutes of all kinds. But even in these jurisdictions, there is an apparent and commendable tendency to be more concerned with ascertaining and giving effect to the legislative intent than toward the preservation of the common law.²⁶ After all, doubt has been expressed whether common law rules play any great part in the enactment of legislation,²⁷ although for the sake of a harmonious system of law, they cannot be utterly ignored, for the common law does make up a large portion of our system of jurisprudence. Their proper place would seem best indicated by the statutory rule that statutes in derogation of the common law, like any other enactment, should be construed with a view to effect their objects and to promote justice.²⁸

The inquiry naturally arises at this point: why should resort to the common law be required or permissible? The following quotation from Dean Pound reveals the answer:

“And so we have in every developed body of law two elements, in the legal system, an imperative element, resting upon the authority of the State, and a traditional element resting upon the experience of the past in the adjudication of controversies. We think commonly of this imperative element as the modern element. But there is a progression from each of these to the other. In time the imperatively enacted rule becomes a part of the legal tradition. A gloss of interpretation grows up around it, and it is swallowed by the common law. For example,

²⁵ Those of a penal nature or in derogation of common law rights are strictly construed. *Henley v Myers*, 76 Kan. 723, 93 Pac. 168; *Deere v Chapman*, 25 Ill. 610; *Oklahoma City v Dist. Court*, 168 Okla. 235, 32 Pac. (2) 318, 93 A.L.R. 489. Also see *Barth v Fidelity, etc., Trust Co.*, 188 Ky. 788, 224 S.W. 351.

²⁶ *Shaw v Railroad Co.*, 101 U.S. 557, 25 L.Ed. 892; *Davis v Abstract Co.*, 121 Ill. Ap. 121; *State v Dalton & Fay*, 134 Mo. Ap. 517, 114 S.W. 1132; *State v Cooper*, 120 Tenn. 549, 113 S.W. 1048; *Norfolk & W. Ry. Co. v Virginian R. Co.*, 110 Va. 631, 66 S.E. 863.

²⁷ Most criticism of the rule seems to be based on the idea that it continues to live chiefly because of our reverence for the common law. *Sedgwick, Stat. Constr.* (2nd Ed.) 273. Also see *infra*, § 248, note 102.

²⁸ Civ. Code of Calif., § 4. And note *Caspar v Lewin*, 82 Kan. 604, 109 Pac. 657; *Gibson v Jenny*, 15 Mass. 205. Also see *People ex rel Krause v Harrison*, 191 Ill. 257, 61 N.E. 99; *Western Lumber Co. v City of Golden*, 23 Colo. Ap. 461, 130 Pac. 1027; *Greenbush Cemetery Ass'n v Van Natta*, 49 Ind. Ap. 192, 94 N.E. 899.

the old English legislation prior to the Revolution is a part of the common law of this country, as for example, the statute of limitations and the statute of frauds. In like manner in our Western States, the homestead statutes have become practically through their construction and interpretation a part of the common law. On the other hand, as the traditional element is developed by juristic science, presently it comes to be declared and formulated authoritatively, as for example, in our negotiable instruments law or sales act or the new uniform partnership act, which simply codify what has been worked out through judicial experience. We have then in our law these two elements. On the one hand, the traditional element resting originally in the customary modes of decisions of causes, but presently developed by judicial experience and by juristic science, until it becomes a scientific body of principles resting, as men believe, upon reason, and having the basis of its authority in conformity to ideals of right and justice, and, on the other hand, the imperative element, which avowedly rests simply upon the authority of the State."^{28a}

A similar view is taken by the English authority, Dwarrris:

"In our, as in every system of jurisprudence, the statute law forms but a part of the law of the system; and, it may be safely asserted, that no system of jurisprudence would be perfect, that should be confined to legislative enactments. It is not within the power of the human mind, or in any combination of minds, to foresee and provide rules beforehand, to regulate the conduct of men in every change and variety of circumstances and conditions, so that when individuals neglect, or violate rules thus prescribed, the departure from right, finds its exact description, and finds a recognized rule to be applied to it, which shall restore the legal relations of the parties.

"Therefore, it follows that the laws of every community consists of two elements. *First*, those rules of conduct which are introduced by the law making power in an express and positive form, which control the particular cases and circumstances to which they relate or describe, and which are called statutes, made by legislation; and *second*, those precepts of natural right which are not superseded by statute law, and which, therefore, remain in full force as to all other circumstances and cases, and which forever continue in force as the measure of justice until superseded or changed by legislation; and while in force, controlled by the rudiments of legal science and the profoundest of human wisdom and experience, remain at all times the highest security and protection of the citizen." Dwarrris on Stat. (Potter), p. 38.

^{28a} Pound, Making Law and Finding Law (1916) 82 Cent. L.J. 351, 353.

Obviously, therefore, in the light of these facts, for they are facts, it is clearly impossible for the courts to ascertain the meaning of any statute without reference to the common law, whose rules control our conduct in the absence of legislation, and upon which much of our legislation stands. The importance is tremendously magnified if we accord the term "common law" its widest and most comprehensive meaning, as it should be where the interpretation of a statute is concerned. Again, Dwarris (p. 296-298) makes the following apt observation:

"But it is not in the power of human intelligence whether combined in legislative bodies, or otherwise, to foresee and provide beforehand, for every combination of facts, or circumstances, which may occur in the infinite variety of human affairs. No human code; no body of legislators ever undertook to do this. No human wisdom could have accomplished such a task, if it had been undertaken. The lawmaker however desirous he may be to make his code complete, can only foresee and provide for classes of cases; and in doing this, he must rather be guided by the experiences of the past, than by any faculty of discerning the future.

"There is accordingly, a large class of cases which are inevitably left unprovided for by every system of human legislation; and it becomes an interesting inquiry to determine how much has been actually settled by legislation, and the rules by which this fact is determined, and what are the rules of conduct, and what the measure of justice that applies to cases not included in the general provisions of legislation. The only answer that can be given to this latter inquiry is, that they are to be determined in each state or government, by what is called its jurisprudence, which is the administration of all the laws of the state including legislation. But jurisprudence, which consists in giving interpretation to, and in making application of statutes to particular cases, includes also the application of those precepts of natural right which have not been superseded by express legislation, and which therefore remain in full force as to all other circumstances and cases.

"These precepts or principles of natural right, which are thus left unaffected by positive legislation, are those fundamental principles which are necessarily presupposed by every code, and by every act of legislation, general or special, while they are also rules to control legislation in the spirit of laws, determine when properly applied, what legal rights and duties have been violated, and what ought to be done, in order that those whose legal relations are disturbed, may be placed, as near

as may be, in the same situation in which they would have stood if the rules of right had been observed. This, equally with legislation, is a measure of justice. This is also jurisprudence. If a case is left wholly unprovided for by legislation or positive law, it is governed solely by the natural law; if in part only, then partly by the natural, and partly by the positive law. The natural law thus becomes the complement of positive legislation, and supplies its deficiencies, in reference to all cases which are either wholly, or in part only, regulated by its provisions.

"Principles of jurisprudence, as above described, become developed in two ways or forms. The first occurs when the question arises in the mind of an individual as to what the law requires him to do in a particular case. When this happens, the party either determines for himself what he ought to do, or he applies for information to some other person, who makes it a business, or profession, to consider and advise in such matters. The principles which are thus developed, gradually assume the character of usages, and become a part of the customary law. The second form in which jurisprudence technically so called is developed, occurs in the administration of justice. The cases which are decided in this way, become precedents or authorities for similar and analogous cases subsequently occurring.

"Legislation being the establishment, beforehand, of those general principles by which civil conduct is to be regulated; and jurisprudence, consisting of those principles which are developed in the application of the former to particular cases, it follows, that the latter will be more or less extensive, according as the former is more or less general or particular; jurisprudence being the most extensive when the law is most general, and least extensive when the law goes furthest into details and particulars. When this is the case, it so far occupies the place which would otherwise be filled with jurisprudence. Jurisprudence, on the other hand, supplying all that legislation leaves unprovided for in the administration of justice, and developing principles which serve as rules of conduct for cases subsequently arising, so far stands in the place, and performs the functions of legislation."

It is clearly apparent that our concepts of proper conduct and our standards of what is right and what is wrong, determine the nature and the scope of the applicability of every statutory enactment. After all, these concepts and standards formulate the "common law" in its widest meaning. From them, springs our ideas of natural right. Without interpreting all legislation in the light of these ideas, most statutes would be woefully inadequate. It would be impossible to decide on an equitable basis many human controversies.

Of course, with this situation in mind, and if we will remember that

“In reality, the law decides equally in regard to all; it considers men in the aggregate; never as individuals; it must not meddle with individual acts, nor with disputes that divide citizens. If it were otherwise, it would daily be necessary to make new laws; their number would destroy their influence, and interfere with their observance. The lawyer would be without functions, and the legislator, involved in details, would soon be nothing more than the lawyer. Private interests would besiege legislative power; they would incessantly turn it aside from the general interest of society.

“There is a science for legislators, as there is one for magistrates, and the one does not resemble the other. The science of the legislator, consists in finding in each case the principles most favorable for the common welfare; the science of the magistrate, is to put these principles in action,—to ramify them,—to extend them by a wise and thoughtful application to private assumptions; to study the spirit of the law when the letter destroys, and not to expose himself to the risk of being by turns slave and rebel; and to disobey in the spirit of servitude.”—

Discours Preliminaire du Premier Project de Code Civil, p. 27. there is nothing inconsistent with the proper sphere of the judiciary under our theory of the separation of powers. Legislatures can only provide rules of general applicability. Where the legislative power ends, there the judicial power begins, so far as the interpretation of statutes is concerned, even though the power thus exercised by the courts is legislative in its nature.

§ 229. **Statutes, Generally.**—When it is necessary to resort to the process of construction, the court may properly refer to certain other statutes in its effort to determine the meaning of the language used by the legislature, especially where such statutes are pre-existing or contemporaneous.²⁹ While this rule is particularly applicable to statutes in *pari materia*,³⁰ the court is not limited to statutes of

²⁹ *Hamilton v Rathbone*, 175 U.S. 414, 44 L.Ed. 219, 20 S.Ct. 155; *City of New Britain v Kolbourne*, 109 Conn. 422, 147 Atl. 124; *McKinney v McClure*, 206 Iowa 285, 220 N.W. 354. “Moreover, the whole body of previous and contemporaneous legislation should be considered in interpreting any statute. The legislative department is supposed to have a consistent design and policy, and to intend nothing inconsistent or incongruous.” *Cummings v Everett*, 82 Me. 260, 19 Atl. 456. And it is also proper to consult a statute which is unconstitutional. *Baird v Hutchinson*, 179 Ill. 435, 53 N.E. 567.

³⁰ See § 231, *infra*.

that character. Certain statutes which are not strictly in *pari materia* may also be given consideration,³¹ such as statutes on cognate subjects,³² since they are within the reason of the rule which allows reference to statutes in *pari materia*.³³ But where the several statutes deal with entirely different subjects, they can have no possible bearing on the construction of each other.³⁴ Similarly, the original enactment may be referred to, where the statute to be construed is the result of adoption, re-enactment, revision,³⁵ or amendment.³⁶ So, too, may an enactment referred to in the statute under consideration be consulted,³⁷ since by reference it becomes a part of the referring statute.

§ 230. Special and General Statutes.—It is not uncommon to find one statute treating a subject in general terms and another treating only a part of the same subject matter in a more minute manner. Where this situation exists, the two statutes should be

³¹ Note *People v Day*, 321 Ill. 552, 152 N.E. 495; *People ex rel Nicholson v Board of Trustees*, 281 Ill. Ap. 394, and *Clark v Murray*, 141 Kan. 533, 41 Pac. (2) 1042.

³² *Stockyards Loan Co. v Nichols*, 243 Fed. 511; *Chicago, etc., R. Co. v Doyle*, 258 Ill. 624, 102 N.E. 260; *People v Day*, 321 Ill. 552, 152 N.E. 495; *St. Louis v Howard*, 119 Mo. 41, 24 S.W. 770; *Smith v People*, 47 N.Y. 330; *Bowe v Richmond*, 109 Va. 254, 64 S.E. 51.

³³ *Ibid.* Also see § 232, *infra*.

³⁴ *Huff v Udey*, 173 Ark. 464, 292 S.W. 693.

³⁵ *Doyle v Wisconsin*, 94 U.S. 50, 24 L.Ed. 64; *Merchants National Bank v U.S.*, 214 U.S. 33, 29 S.Ct. 593, 53 L.Ed. 900; *State v Lesis*, 142 N.C. 626, 55 S.E. 600; *Sharp v Cincinnati, etc., R. Co.*, 133 Tenn. 1, 179 S.W. 375.

³⁶ *McGuire v Chicago, etc., R. Co.*, 131 Iowa 340, 48 N.W. 98. It will also be presumed that the legislature had the original statute in mind when the amendatory act was enacted. *American Woodenware Mfg. Co. v Schlorling*, 96 Ohio St. 305, 117 N.E. 366. An amendment, however, not included when the bill is finally passed cannot be considered. *Lane v Kolb*, 92 Ala. 636, 9 So. 873.

³⁷ *Interstate Consol. St. Ry. Co. v Mass.*, 207 U.S. 79, 28 S.Ct. 26, 52 L.Ed. 111; *In re Heath*, 144 U.S. 92, 12 S.Ct. 615, 36 L.Ed. 358. Also see § 234, *infra*, for application to adopted statutes.

read together and harmonized.³⁸ This is especially true where the two statutes are in *pari materia*.³⁹ In the event of repugnancy, the special statute should prevail,⁴⁰ in the absence of a contrary legislative intent,⁴¹ since the specific statute more clearly evidences the legislative intent than the general statute does.⁴² And this rule—that a statute relating to a specific subject controls a general statute which includes the specific subject—is not necessarily dependent on the time of the enactment of such statutes,⁴³ although it may be a vital and important consideration.

38 *Indian Fred v State*, 36 *Ariz.* 48, 282 *Pac.* 930; *Pierce v Riley* (*Calif.*) 70 *Pac.* (2) 206; *Great Western Acc. Ins. Co. v Martin*, 183 *Iowa* 1009, 166 *N.W.* 705; *Board of Educ. v Blondell*, 251 *Mich.* 528, 232 *N.W.* 375; *Tevis v Foley* (*Mo.*) 30 *S.W.* (2) 68. And where a general act standing alone would also include the same matter as was covered by the special act, the latter will be construed as an exception to the general act. *Sanford v Sanford*, 286 *Fed.* 777; *Barrett v Imhoff*, 291 *Mo.* 603, 238 *S.W.* 122; *State v Zangerlee*, 100 *Ohio St.* 414, 126 *N.E.* 413.

³⁹ See § 231, notes 60 and 61, *infra*.

⁴⁰ *U.S. ex rel Welch v Farley*, 18 *Fed. Supp.* 75; *Robbins v Comm. of Lincoln Park*, 332 *Ill.* 571, 164 *N.E.* 10; *Wulf v Fitzpatrick*, 124 *Kan.* 642, 261 *Pac.* 838; *Layman v Persons*, 233 *N.Y.S.* 217, 133 *Misc.* 661. Thus, a statute which grants a special power to a city to regulate the use of its streets, will control a general law relating to chauffeurs' licenses. *Klein v Cincinnati*, 33 *Ohio Ap.* 137, 168 *N.E.* 549. Similarly, a special act making warehouse receipts negotiable controls a general law relating to non-negotiable instruments under the law merchant. *Luby v Bell* (*Tex.*) 15 *S.W.* (2) 106. And see *State ex rel Judd v Cooney*, 97 *Mont.* 75, 32 *Pac.* (2) 851, where an initiative measure was held to be a special act.

⁴¹ *Hoffman v New York*, 296 *N.Y.S.* 850, 163 *Misc.* 202; *Chippewa Co. v Railroad Comm.*, 164 *Wis.* 105, 159 *N.W.* 739.

⁴² *San Antonio, etc., R. Co. v State* (*Tex.*) 95 *S.W.* (2) 680.

⁴³ *Dallman v Campbell*, 56 *Ohio Ap.* 88, 10 *N.E.* (2) 38. But where the special statute is enacted after the general statute, the former becomes all the more controlling. *U.S. v Griffin*, 14 *Fed.* (2) 326; *Daly v Carr*, 206 *Ind.* 554, 190 *N.E.* 429, because the rule that of two enactments, the last enacted controls, since it is the last expression of the legislative will, also comes into play. On the other hand, where the earlier statute is special and the later statute general, a presumption arises that the special was intended to remain in force, as an exception. *Niagara Fire Ins. Co. v Raleigh Hardware Co.*, 62 *Fed.* (2) 705; *State ex rel Equitable Sav. & Bldg. Ass'n v Brown*, 334 *Mo.* 781, 68 *S.W.* (2) 55. And the special will control even though both are passed at the same legislative session. *Smith v Highway Comm.* 138 *S.C.* 374, 136 *S.E.* 487.

§ 231. **Statutes in Pari Materia.**—Statutes in *pari materia*,⁴⁴ that is, those which relate to the same matter or subject,⁴⁵ although some may be special and some general,⁴⁶ in the event one of them is

⁴⁴ It is not always easy to determine when statutes are in *pari materia* and when they are not. They must, in order to be in *pari materia*, relate to the same matter, or stated more specifically, they must relate to the same person or thing, or to the same class of persons or things. *People v Wallace*, 291 Ill. 465, 126 N.E. 175; *State v Gerhart*, 145 Ind. 439, 44 N.E. 469, 33 L.R.A. 313; *State v Davis*, 314 Mo. 373, 284 S.W. 464; *People v Sisson*, 222 N.Y. 387, 118 N.E. 789, or have a common purpose. *U.S. v Colorado*, etc., R. Co., 157 Fed. 321, 85 C.C.A. 27. And conversely, statutes which do not relate to the same subject or have a common purpose are not in *pari materia*. *Louisiana v Mississippi*, 202 U.S. 1, 26 S.Ct. 408, 50 L.Ed. 913; *People v Metz*, 193 N.Y. 148, 85 N.E. 1070. Mere simultaneity of enactment does not make statutes in *pari materia*, *Leavenworth*, etc., R. Co. v *United States*, 92 U.S. 733, 23 L.Ed. 634, any more than their enactment at different dates and different sessions will prevent them from being in *pari materia*. *State v Gerhart*, *supra*. Nor are the statutes of different states in *pari materia*. *Holden v Stratton*, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018. Yet, what about adopted statutes and uniform state laws? See §§ 221 and 223, *infra*. And see *People v Erie R. Co.*, 198 N.Y. 369, 91 N.E. 849, where a state statute and a federal statute were involved. The principle of *pari materia* is illustrated in *Layne-Western Co. v Buchanan County*, 85 Fed. (2) 343, where statutes creating the offenses of bribery of a judicial officer, acceptance of a bribe by a judge or juror, or other named individuals, were involved. Also see *Meznarich v Republic Coal Co. (Mont.)* 53 Pac. (2) 82 (workmen's compensation statutes); *Passaic Nat. Bank v Eelman*, 116 N.J.L. 279, 183 Atl. 677 (execution statutes); *Phillips v Slaughter*, 209 N.C. 543, 183 S.E. 897 (absentee ballot law and Australian ballot law). And see *Union Iron Works v Industrial Acc. Comm.*, 190 Calif. 33, 210 Pac. 410, for a good discussion of when statutes are not in *pari materia*. That statutes of different sovereigns are not in *pari materia*, see *Holden v Stratton*, 198 U.S. 202, 25 S.Ct. 656, 49 L.Ed. 1018. Also note *Union Iron Works v Industrial Acc. Comm.*, 190 Calif. 33, 210 Pac. 410, and *Central R. R. Co. v Hamilton*, 71 Ga. 461.

⁴⁵ *People v Wallace*, 291 Ill. 465, 126 N.E. 175; *State v Young*, 17 Kan. 414; *State v Davis*, 314 Mo. 373, 284 S.W. 464; *People v Sisson*, 222 N.Y. 387, 118 N.E. 789; *Paltro v Aetna Casualty Co.*, 119 Wash. 101, 204 Pac. 1044.

⁴⁶ *Carr v Little*, 188 N.C. 100, 123 S.E. 625. Also see § 223, *supra*. But private acts cannot be in *pari materia*: "... private acts of the legislature, conferring distinct rights on different individuals, which never can be considered as being one statute, or the parts of a general system, are not to be interpreted, by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons." *U.S. v President, Eagle Bank*, 7 Conn. 456.

ambiguous or uncertain,⁴⁷ are to be construed together;⁴⁸ even if the various statutes have not been enacted simultaneously,⁴⁹ and do not

⁴⁷ *Hamilton v Rathbone*, 175 U.S. 414, 44 L.Ed. 219, 20 S.Ct. 155; *U.S. v Colorado, etc.*, R. Co., 157 Fed. 321, 85 C.C.A. 27. It must be remembered, however, that this rule of construction, like all others, cannot be used if the statute is clear and unambiguous and not in conflict with existing law. *Rosencrans v U.S.*, 165 U.S. 257, 17 S.Ct. 302, 41 L.Ed. 708; *Ackerman v Green*, 201 Mo. 231, 100 S.W. 30; *Chase v Lord*, 77 N.Y. 1. Is this true? See *Morrill County v Bliss*, 125 Neb. 97, 249 N.W. 98. Also see § 232, *infra*.

⁴⁸ *Richardson v Harmon*, 222 U.S. 96, 56 L.Ed. 110, 32 S.Ct. 27; *State v Gerhart*, 145 Ind. 439, 44 N.E. 469, 33 L.R.A. 313; *St. Louis v Howard*, 119 Mo. 41, 24 S.W. 770; *Morrill County v Bliss*, 125 Neb. 97, 249 N.W. 98, 89 A.L.R. 932; *Dallas v Wright*, 120 Tex. 190, 36 S.W. (2) 973, 77 A.L.R. 709. And see *United Society v President of Eagle Bank*, 7 Conn. 456, and *Thomas v Mahan*, 4 Me. 513, that this rule does not apply to private acts. Nor does it apply to constitutional provisions and statutes allegedly in *pari materia*. *State v Williams*, 13 S.C. 546. But note *Common. v International Harvester Co.*, 131 Ky. 551, 115 S.W. 703; *Billingsley v State*, 14 Md. 369, and § 220, *supra*. Also see 33 Harv. L.Rev. (1920) 615. It will apply to the different sections of a code. *Kidd v Bates*, 120 Ala. 79, 23 So. 735, 41 L.R.A. 154. Also see *Chapman v Berry*, 73 Miss. 437, 18 So. 918, where different chapters were involved.

⁴⁹ *White v Morton (W.Va.)* 171 S.E. 762. And see *U.S. v Freeman (U.S.)* 3 How. 556, 11 L.Ed. 557; *W. A. Sheaffer Pen Co. v Lucas*, 41 Fed. (2) 117; *Amos v Conkling*, 99 Fla. 206, 126 So. 283; *Lawrence v People*, 188 Ill. 407, 58 N.E. 991; *Keller v State*, 11 Md. 525; *State v Davis*, 314 Mo. 373, 284 S.W. 464; *Bear v Bear*, 33 Pa. 530. For reference to prior legislation, see *Vane v Newcombe*, 132 U.S. 220, 33 L.Ed. 310, 10 S.Ct. 60; *Connelly v Lawhon*, 180 Ark. 964, 23 S.W. (2) 990; *People v Landers*, 329 Ill. 453, 160 N.E. 836; *Taylor v Caribou*, 102 Me. 401, 67 Atl. 2; *State v Hostetter*, 137 Mo. 636, 39 S.W. 270, 38 L.R.A. 208; *Sumption v Rogers*, 242 Pa. St. 348, 89 Atl. 121; *Sorrell v White*, 103 Vt. 277, 153 Atl. 359. But note *People v Central Ill. Public Serv. Co.*, 328 Ill. 440, 159 N.E. 797, 799: "Past or concurrent legislation in *pari materia* may be considered in interpreting a particular statute, but not subsequent legislation. If this were not true, the same law might have a different meaning with each passing General Assembly." And note *Penn. Mutual Life Ins. Co. v Collector of Int. Revenue*, 252 U.S. 523, 40 S.Ct. 397, 64 L.Ed. 698. In this connection, is not the following reasoning in *State v Omaha Elevator Co.*, 75 Neb. 637, 106 N.W. 979, 110 N.W. 874, pertinent? "All statutes upon the same subject are to be regarded as part of one system, and later statutes are to be considered supplementary or complementary to those preceding them upon the same subject." That subsequent legislation may be consulted, see *Smith v People*, 47 N.Y. 330; *Board of Com'rs v Branaman*, 169 Ind. 80, 82 N.E. 65; *Campbell v Youngson*, 80 Neb. 322, 114 N.W. 415.

refer to each other expressly,⁵⁰ and although some of them have been repealed or have expired,⁵¹ or held unconstitutional,⁵² or invalid.⁵³ In this connection, however, the legislative intention must not be confounded with the power of the legislature to carry that intention into effect. To refuse to give force and validity to a law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional statute is stricken out.⁵⁴

The rule which thus allows the court to resort to statutes in *pari materia* finds its justification in the assumption that statutes relating to the same subject matter were enacted in accord with the

⁵⁰ *State v McMillan*, 55 Fla. 246, 45 So. 882; *Harrison v Walker*, 1 Ga. 32; *People v Cowen*, 283 Ill. 308, 119 N.E. 335; *Fitzgerald v State* (Iowa) 260 N.W. 681; *Hagerstown v Littleton*, 143 Md. 591, 123 Atl. 140; *In re Book's Will* (N.J.) 107 Atl. 435; *Hill v Roberts*, 142 Tenn. 215, 217 S.W. 826.

⁵¹ *Tiger v Western Inv. Co.*, 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738; *Steck v Prentice*, 43 Colo. 17, 95 Pac. 552; *Hyland v Rochelle*, 179 Ind. 671, 100 N.E. 842; *Baird v Hutchinson*, 179 Ill. 435, 53 N.E. 567; *State v Davis*, 314 Mo. 373, 284 S.W. 464; *Baxter v Davis*, 58 Ore. 109, 112 Pac. 410; *Daniel v Simms*, 49 W.Va. 554, 39 S.E. 690; *Kollock v Madison*, 84 Wis. 458, 54 N.W. 725.

⁵² *Board of Com'rs v State*, 184 Ind. 418, 111 N.E. 417; *Sales v Barber Pav. Co.*, 166 Mo. 671, 66 S.W. 979. Also see note 53, *infra*.

⁵³ *Baird v Hutchinson*, 179 Ill. 435, 53 N.E. 567. "In subjecting an enactment to such an investigation the court will not reject from consideration an unconstitutional section, if one there be, but will refer to it as constituting a part of the enactment for all the purposes of construction. The legislature passed an entire statute on the supposition, of course, that it is valid in all its parts and to take effect as a whole. Hence the value of an invalid section as an indication of the intention of the law-making body is in no wise diminished by the fact it is discovered, after the enactment of the law, it was not within the power of the legislature to enact it. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and validity to a provision of the law is one thing, and to refuse to read it is a very different thing. It is a mere figure of speech that we say an unconstitutional section of a statute is "stricken out". For all the purpose of construction it is to be incorporated as a part of the act. The meaning of the legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law. Clauses, provisions or sections of the same act, though unconstitutional and void, are to be considered in construing valid clauses, provisions or sections of the same act, in order to determine the legislative will."

⁵⁴ *Ibid*.

same legislative policy;⁵⁵ that together they constitute a harmonious or uniform system of law;⁵⁶ and that, therefore, in order to maintain this harmony, every statute treating the same subject matter should be considered.⁵⁷ As a result, statutes in *pari materia* should not only be considered but also construed to be in harmony with each other in order that each may be fully effective.⁵⁸ They are to be construed together as if they constituted one act.⁵⁹ Moreover, this

⁵⁵ *Layne-Western Co. v Buchanan County*, 85 Fed. (2) 343; *Conn v Bd. of Com'rs*, 151 Ind. 517, 51 N.E. 1062; *People v Howard*, 50 Mich. 239, 15 N.W. 101; *Naill v Keese*, 5 Tex. 23.

⁵⁶ *C. N. Ray Corp. v Sec. of State*, 241 Mich. 457, 217 N.W. 334; *Hannibal Trust Co. v Elzea*, 315 Mo. 485, 286 S.W. 371. And see cases under note 55, *supra*.

⁵⁷ *Conn v Board of Com'rs.*, 151 Ind. 517, 51 N.E. 1062; *State ex rel Lefholz v McCracken (Mo.)* 95 S.W. (2) 1239. And see *Common. v Barney*, 115 Ky. 475, 74 S.W. 181, where the general words of a statute were restricted by statutes in *pari materia*.

⁵⁸ *U.S. v Mullendore*, 35 Fed. (2) 78; *People v Flynn*, 265 Ill. 414, 106 N.E. 961; *Arkansas City v Turner*, 116 Kan. 407, 226 Pac. 1009; *Crawford v Roloson*, 262 Mass. 527, 160 N.E. 303; *State v Davis*, 314 Mo. 373, 284 S.W. 464; *People v Ekerold*, 211 N.Y. 386, 105 N.E. 670; *Young v Davis*, 182 N.C. 200, 108 S.E. 630; *Harris v Halverson*, 192 Wis. 71, 211 N.W. 295. "Statutes which are not inconsistent with one another, and which relate to the same subject, are in *pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times. Acts in *pari materia* should be construed together, and so as to harmonize and give effect to their various provisions." *Morrill County v Bliss*, 125 Neb. 97, 249 N.W. 98, 89 A.L.R. 932.

⁵⁹ See *Wilson v State*, 117 Tex. Cr. 63, 36 S.W. (2) 733. Also see Note 18 Ann. Cas. 424. In this connection note the following instances where acts in *pari materia* were construed as one unit: acts relating to the recording of deeds, mortgages, and other instruments of title, *Seat v Louisville, etc., Land Co.*, 219 Ky. 418, 293 S.W. 986; anti-trust law excluding from its operation agricultural non-profit associations and an act defining agricultural products and providing for the organization of non-profit co-operative associations, *Co-operative Ass'n v Hardee*, 114 Fla. 670, 154 So. 690; statute defining property and a statute defining the offense of theft of property, *People v Roland*, 134 Calif. Ap. 675, 26 Pac. (2) 517; statute respecting allowance for support of widow and minor children and statute relating to exempt property, *Eoff v Pace (Tex.)* 48 S.W. (2) 956; Lord Campbells act and compensation act, *Storrs v Meeh*, 166 Md. 124, 170 Atl. 743; Federal Employers' Liability Act and Safety Appliance Act, *McCallister v St. Louis, etc., R. Co.*, 324 Mo. 1005, 25 S.W. (2) 791; statutes defining powers of, and statutes governing appointment of receivers, *Good v Deer*, 46 Fed. (2) 411; statute relating to admissibility of hospital records and statute pertaining to declarations of deceased, *Kelley v Jordam Marsh Co.* 278 Mass. 101, 179 N.E. 299.

rule is especially applicable where the several statutes are not only in *pari materia* but have been enacted on the same day,⁶⁰ or during the same legislative session.⁶¹ And some courts even go so far as to permit the consultation of vetoed bills that are in *pari materia* with bills which have been duly enacted into law.⁶²

§ 232. The Doctrine of *Pari Materia* Analyzed.—Unfortunately, the reason behind the doctrine of *pari materia* can hardly be gathered from the various cases, except by inference or implication. Most cases blandly state the doctrine and go no further. Nevertheless, the application of the doctrine is made much easier, if the reason for its use is understood.

In the preceding section, we have stated that the resort to statutes in *pari materia* can be justified on the ground that it may be assumed that all statutes which relate to the same subject matter were enacted in accord with the same general legislative policy, and that together they constitute a harmonious or uniform system of law. And it is obvious that only by construing every statute treating the same subject matter together is it possible to maintain this harmony. Unless every statute relating to the same subject is taken to constitute collectively one system, or construed as constituting one general statute or law, a uniform system would be impossible, and hopeless inconsistencies would exist, and it would be impossible for one to know what the law was under a given set of circumstances.

⁶⁰ *Devons v Gallatin County*, 244 Ill. 40, 91 N.E. 102; *White v Meadville*, 177 Pa. St. 643, 35 Atl. 695; *Bird v State*, 131 Tenn. 518, 175 S.W. 554; *State v Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194.

⁶¹ *Hagler v Security Mut. Life Ins. Co.*, 244 Fed. 863; *Amos v Conkling*, 99 Fla. 206, 126 So. 283; *People v Day*, 321 Ill. 552, 152 N.E. 495; *Iowa Motor Vehicle Ass'n. v Bd. of Railroad Com'rs.*, 207 Iowa 461, 221 N.W. 364, aff. 280 U.S. 529, 74 L.Ed. 595, 50 S.Ct. 151; *Voran v Wright*, 129 Kan. 1, 281 Pac. 938, 284 Pac. 807; *Platt v Common.*, 256 Mass. 539, 152 N.E. 914; *State ex rel Moseley v Lee*, 319 Mo. 976, 5 S.W. (2) 83; *Standard Slag Co. v Southern Security Co.*, 117 Ohio St. 512, 159 N.E. 559; *Common. v Lomas*, 302 Pa. 97, 153 Atl. 124; *State v Clausen*, 63 Wash. 535, 116 Pac. 7. See *State ex rel Red River Valley Co. v Dist. Ct.*, 39 N.M. 523, 51 Pac. (2) 239, where the acts involved were passed at different sessions of the same legislature.

⁶² *Board of Com'rs. v State*, 184 Ind. 418, 111 N.E. 417; *Contra: Smith v Stiles*, 195 Ala. 107, 70 So. 905.

We must presume that the legislature passes each and every statute with a knowledge of existing law. If such a presumption could not be indulged in, it would be difficult, if not utterly impossible, to justify the resort to previous legislation. Moreover, it would be impossible without such a presumption to maintain a harmonious system of law, which is so essential to a workable and equitable system of jurisprudence. Perhaps in many instances, the presumption is without foundation. Yet in many others, it actually exists.

After all, and especially if the legislature has knowledge, either actually or presumptively, of all other existing legislation upon a given subject—and such a knowledge must exist in order for the law-makers to legislate wisely—there is as much reason for applying the rule of *pari materia* as there is in construing a statute as a whole or in connection with its context. It has already been pointed out that due to the limitations of human expression, the meaning of a sentence cannot be gathered from one or two words, nor can the meaning of a paragraph be gathered from the abstract treatment of one or two sentences. Similarly, in order to ascertain the meaning of a specific statute, resort to other statutes relating to the same subject is essential. If certain angles have been covered by other legislation, it is obvious that the legislature would not again include them.

Considerable light is shed upon our subject by the following quotation from an eminent authority:

“As one part of a statute is properly called in, to help the construction of another part, and is fitly so expounded, as to support and give effect, if possible to the whole; so is the comparison of one law with other laws made by the same legislature, or upon the same subject, or relating expressly to the same point, enjoined for the same reason, and attended with a like advantage. In applying the maxims of interpretation, the object is throughout, first, to ascertain by legitimate means; and next to carry into effect; the intentions of the framers. It is to be inferred, that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is therefore an established rule of law, that all acts in *pari materia* are to be taken together, as if they were one law, and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view. If one statute prohibits doing a

thing, and another statute be afterwards made, whereby a forfeiture is inflicted upon the person doing that thing, both are considered as one statute. When an action founded on one statute, is given by a subsequent statute in a new case, everything annexed to the action by the first statute is likewise given. Indeed, the latter act may be considered as incorporated with the former." Dwarris (Potter) on Statutes, 189-190.

Indeed, as we have already pointed out in our discussion of unambiguous statutes, statutes in *pari materia* must be regarded as a part of the primary source—the language of the statute—from which the legislative intent is to be derived, so that it would seem proper to consult all statutes on the same subject, even where the statute subjected to construction upon its face was not ambiguous or of doubtful meaning. This is essential, if we are to have a harmonious legal system.

§ 233. Re-Enacted Statutes.⁶³—Generally, where a statute, or a provision thereof, has been re-enacted by the legislature in the same⁶⁴ or substantially the same,⁶⁵ language, the law-makers are presumed to have adopted the construction placed upon such statute or provision by the court of last resort in the state,⁶⁶ unless the statute as re-enacted clearly indicates a different intention.⁶⁷ In

⁶³ Also see *infra*, Chapt. XXIX, The Construction of Codes, Revisions and Compilations, §§ 324-327.

⁶⁴ *Bruce v Tobin*, 245 U.S. 18, 62 L.Ed. 123, 38 S.Ct. 7; *Browder v Gunter*, 220 Ala. 407, 125 So. 646; *Harvey v Travelers Ins. Co.*, 18 Colo. 354, 32 Pac. 935; *People v Stewart*, 281 Ill. 242, 118 N.E. 55; *City of Topeka v Wasson*, 101 Kan. 824, 168 Pac. 902; *King v Thissell*, 222 Mass. 140, 109 N.E. 880; *State v Messino (Mo.)* 30 S.W. (2) 750; *In re Cole's Estate*, 235 N.Y. 48, 138 N.E. 733; *Kelly v Trehy*, 133 Va. 160, 112 S.E. 757.

⁶⁵ *Hart v Hart*, 31 Colo. 333, 73 Pac. 35; *People v Bradshaw*, 303 Ill. 558, 337 N.E. 276; *New York Life Ins. Co. v Burbank (Iowa)* 216 N.W. 742; *People v Rann*, 215 Mich. 241, 183 N.W. 924; *In re Wooley's Estate*, 96 Vt. 60, 117 Atl. 370.

⁶⁶ *Dollar Sav. Bank v U.S. (U.S.)* 19 Wall. 227, 22 L.Ed. 80; *Bruce v Sierra*, 175 Ala. 517, 57 So. 709; *Evans v State*, 165 Ind. 369, 74 N.E. 244, 75 N.E. 651; *Hoy v Hoy*, 93 Miss. 732, 48 So. 903; *Sampson v Sampson*, 16 R.I. 456; *Scott v Rinehart*, 116 W.Va. 319, 180 S.E. 276. Several successive re-enactments would naturally increase the presumption's value. *Ardley v Durey*, 40 Fed. (2) 293.

⁶⁷ *Edwards v Wabash Ry. Co.*, 264 Fed. 610; *Atton v South Chicago City R. Co.*, 236 Ill. 507, 86 N.E. 277; *Colver v McInturff*, 112 Kan. 604, 212 Pac. 88; *State v Schenk*, 238 Mo. 429, 142 S.W. 263; *Overland v Jackson*, 128 Ore. 455, 275 Pac. 21.

other words, the re-enactment of a statute *ipsissimis verbis* adopts the judicial interpretation of the earlier statute as of the time of the re-enactment.⁶⁸ But if the re-enacted statute differs essentially from the original, the foregoing presumption is not applicable.⁶⁹ Moreover, the judicial decisions must be those of a court of last resort,⁷⁰ and they must be uniform.⁷¹ And even when the decisions possess this essential character, they will be applicable only to the extent that the court actually construed the legislative enactment.⁷² Similarly, the re-enactment of a statute upon which the legislature,⁷³ or for that matter, an administrative department of the government,⁷⁴ has previously placed a construction, will operate as an adoption

⁶⁸ U.S. v Cerecedo, 209 U.S. 338, 28 S.Ct. 532, 52 L.Ed. 821; Price v Lancaster County, 189 Pa. 95, 41 Atl. 987. ". . . when a statute has been construed by the highest court of the state that construction is as much a part of the statute as if it were originally written into it." Yakima Valley Bank v Yakima County (Wash.) 271 Pac. 820.

⁶⁹ DeGanay v Lederer, 239 Fed. 568; McGregor v Bd. of Trustees, 159 Calif. 441, 114 Pac. 566; People ex rel Rand v Craig, 231 N.Y. 216, 131 N.E. 894.

⁷⁰ See cases under note 66, supra. The construction of an intermediate court or an inferior court should not be regarded. Rea v Keller, 215 Ala. 672, 112 So. 211. But note Texas Fidelity & Bonding Co. v Austin, 112 Tex. 229, 246 S.W. 1026, where the construction of an intermediate court was properly regarded as strong indication of adoption on re-enactment, since the court of last resort had refused to review the decision. Also see Citizens Trust Bank v Fletcher Am. Co., 207 Ind. 328, 190 N.E. 868, reh. den. 207 Ind. 328, 192 N.E. 451, where the construction of an inferior court would not be presumed to be adopted, if the supreme court had not reviewed its decision.

⁷¹ Domestic Block Coal Co. v DeArmey, 179 Ind. 592, 100 N.E. 675, 102 N.E. 675.

⁷² Jafrey v Smith, 76 N.H. 168, 80 Atl. 504. Also note State ex rel Meininger v Brerer, 304 Mo. 381, 264 S.W. 1.

⁷³ U.S. v Gilmore (U.S.) 8 Wall. 330; State v Conn, 110 Ohio St. 404, 144 N.E. 130. And the construction of a federal statute is adopted by a state legislature where it enacts a statute based on such federal statute. Rainey v Michel (Calif.) 57 Pac. (2) 932, 105 A.L.R. 148.

⁷⁴ U.S. v Folk, 204 U.S. 143, 27 S.Ct. 191, 51 L.Ed. 411; Allen v Morseman, 46 Fed. (2) 891; Van Veen v Graham County, 13 Ariz. 167, 108 Pac. 252; New York Life Ins. Co. v Burbank (Iowa) 216 N.W. 742; Wayne County v Fuller, 250 Mich. 227, 229 N.W. 911; State v Schenk, 238 Mo. 429, 142 S.W. 263; State v Sheldon, 79 Neb. 455, 113 N.W. 208; Ross v Miller, 115 N.J.L. 61, 178 Atl. 771.

of that construction.⁷⁵ In other words, the re-enactment of a statute in the same or substantially the same terms does not alter its scope or meaning, in the absence of a clear intention to the contrary.⁷⁶

As a result, it is proper for the court to resort to the prior enactment in order to determine the meaning of the re-enactment,⁷⁷ for, after all, the re-enactment is declaratory of a continuance of the legislative intent as expressed in the prior act.⁷⁸ This is equally true where the re-enacted statutes are incorporated in a code, as their meaning is not thereby affected.⁷⁹

§ 234. Adopted Statutes.—A statute may adopt all or only a part of another statute by express reference,⁸⁰ or by re-enactment of

⁷⁵ *Merchants Bank Bldg. Co. v Helvering*, 84 Fed. (2) 478. At least, the re-enactment in the same or substantially the same language is persuasive of adoption, *Logan Gregg Hardw. Co. v Heimer*, 26 Fed. (2) 131; *Greene v Jones*, 170 Ky. 757, 186 S.W. 675; *Timmonds v Kennish*, 244 Mo. 318, 149 S.W. 652; *State v Moore*, 50 Neb. 88, or entitled to great weight. *Koshland v Helvering*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268.

⁷⁶ In re Opinion of Justices, 237 Mass. 591, 130 N.E. 685; *Snidow v Montana Home for the Aged (Mont.)* 292 Pac. 722.

⁷⁷ *People v Clement*, 127 N.Y.S. 68, 142 Ap. Div. 908, aff. 201 N.Y. 592, 95 N.E. 1137. Also see *Delaney v Grand Lodge*, 244 Mass. 556, 138 N.E. 918. "Of course, the whole chapter should be studied; but it should be borne in mind that, though technically enacted together, the different sections and clauses were first enacted independently, at different times, under different circumstances, and for different purposes. In our effort to ascertain the meaning of any section or clause, we should resort to the original statute from which it was condensed, and search for the legislative intent in the words of the statute, and also in its occasion and purpose, and in the jurisprudence of the time. When a statute is incorporated in a general revision of all the statutes, and re-enacted along with the re-enactment of other statutes, its purpose and effect are not changed, unless there be some compelling change in the language. Usually a revision of the statutes simply iterates the former declaration of legislative will." *Cummings v Everett*, 82 Me. 260, 19 Atl. 456.

⁷⁸ *Continental Purchasing Co. v Woodworth*, 268 N.Y.S. 117, 239 Ap. Div. 638. Also see *Sacknoff v Sacknoff*, 131 Me. 280, 161 Atl. 669.

⁷⁹ *Comer v State*, 103 Ga. 69, 29 S.E. 501; *Tise v Shaw*, 68 Md. 1, 11 Atl. 363. And note *Church v Crocker*, 3 Mass. 17, where the title of the original act was read into the code.

⁸⁰ *U.S. v Phelps*, 22 Fed. (2) 288, cert. den. 276 U.S. 630, 48 S.Ct. 324, 72 L.Ed. 741; *Jones v Chamberlain*, 109 N.Y. 100, 16 N.E. 72; *Free's Appeal*, 301 Pa. 82, 151 Atl. 583.

the former *in verbatim* or in substantially the same language.⁸¹ Where this is true, the adopted provisions become a part of the adopting statute.⁸² Similarly, a statute may adopt the provisions of another statute by what is known as descriptive reference.⁸³ In this case, the adopted provisions become a part of the adopting statute but only those provisions which relate to the new statute's subject.⁸⁴

Moreover, the omission of a provision from an adopting statute indicates that it was not intended that such provision should be adopted.⁸⁵ And in like manner, the departure in a statute, modeled after the statute of another state, from the phraseology of the latter statute, shows that the legislature intended to express an intent different from that expressed in the latter enactment.⁸⁶

Furthermore, it is also a general rule that the adoption of a statute of another state or country, will also carry with it the interpretation or construction placed upon such statute by the highest

⁸¹ *Willis v Eastern Trust, etc., Co.*, 169 U.S. 295, 42 L.Ed. 752, 18 S.Ct. 347; *New York-Alaska Gold Dredging Co. v Walbridge*, 38 Fed. (2) 38; *Rigg v Wilton*, 13 Ill. 15; *State v Miles (Mo.)* 109 S.W. 614. The adoption need not be in the identical language of the adopted statute. *Succession of Hedden (La.)* 140 So. 851, rev. 146 So. 732. Substantial identity is sufficient. *In re Zweigs Will*, 261 N.Y.S. 400, 145 Misc. 839. Moreover, the adoption occurring by this method, takes place by implication. *Gibson v Gordon*, 30 Ariz. 310, 246 Pac. 1036. Also see *Duys & Co. v Tone (Conn.)* 5 Atl. (2) 297, where the words "agricultural labor" were adopted from the Federal Unemployment Act.

⁸² *Engel v Davenport*, 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813; *Hutto v Walker County*, 185 Ala. 505, 64 So. 313; *Ramish v Hartwell*, 126 Calif. 443, 58 Pac. 920; *Houston v Thomas*, 168 Ga. 67, 146 S.E. 908; *Zurich Gen. Acc., etc., Ins. Co. v Indust. Comm.*, 331 Ill. 576, 163 N.E. 466; *State v Marion County*, 170 Ind. 595, 85 N.E. 513; *Santee Mills v Query*, 122 S.C. 158, 115 S.E. 202; *Corkery v Hinkle*, 125 Wash. 671, 217 Pac. 47.

⁸³ *In re Heath*, 144 U.S. 92, 12 S.Ct. 615, 36 L.Ed. 358; *DuPont v Miller (Dela.)* 198 Atl. 203.

⁸⁴ *Gillesby v Bd. of Com'rs*, 17 Idaho 586, 107 Pac. 71; *State v Marion County*, 170 Ind. 595, 85 N.E. 513; *State v Board of Comr's*, 83 Kan. 199, 110 Pac. 92; *In re Womelsdorf*, 8 Pa. Co. 207.

⁸⁵ *Hendrix v Gold Ridge Mines (Idaho)* 54 Pac. (2) 254.

⁸⁶ *Chicago Corp. v Munds (Dela.)* 172 Atl. 452. "In deliberately changing the words, the legislature had some purpose in mind. That purpose was doubtless to limit or enlarge the adopted law as the change in words implies." *In re Eaton's Estate (Wash.)* 16 Pac. (2) 433.

courts⁸⁷ of the jurisdiction from which the statute was adopted.⁸⁸ In fact, there is a presumption that the legislature in adopting a statute also adopts the construction which has been placed upon it,⁸⁹ in the absence of some indication of a contrary intent.⁹⁰ This rule is applicable to federal statutes adopted by a state,⁹¹ or to state statutes adopted by the federal government.⁹² But the construction

⁸⁷ *Andrews v Hovey*, 124 U.S. 694, 8 S.Ct. 676, 31 L.Ed. 557; *Osborne v Home Life Ins. Co.*, 123 Calif. 610, 56 Pac. 616; *Smith v Baker*, 5 Okla. 326, 49 Pac. 61; *Given v Owen*, 73 Okla. 146, 175 Pac. 346 (intermediate court decision held not binding); *Draper v Emerson*, 22 Wis. 147. But see *Carbonell v People*, 27 Fed. (2) 253. Nevertheless, the decisions of the lower courts of the foreign jurisdiction are always entitled to consideration. *Clay v Edwards*, 84 N.J.L. 221, 86 Atl. 548. Also see § 233, note 70, supra. And while usually the construction placed upon the adopted statute by a non-judicial officer or body is not accepted, *Public Serv. Ry. Co. v Bd. of Pub. Utility Com'rs*, 81 N.J.L. 363, 80 Atl. 27, the construction by the commissioners who prepared the code of the state from which the statute was adopted, accompanied the adopted statute. *Bailey Loan Co. v Seward*, 9 S.D. 326, 69 N.W. 58.

⁸⁸ *Robinson v Belt*, 187 U.S. 41, 23 S.Ct. 16; *Hartford Acc. & Ind. Co. v Hoage*, 85 Fed. (2) 411; *Germania Ins. Co. v Ross-Lewin*, 24 Colo. 43, 51 Pac. 483; *People v Union Trust Co.*, 255 Ill. 168, 99 N.E. 377; *State v Ensley*, 177 Ind. 483, 97 N.E. 1; *Sutton v Heinzie*, 84 Kan. 756, 115 Pac. 560; *Pratt v Miller*, 109 Mo. 78, 18 S.W. 965; *Mann v Carter*, 74 N.H. 345, 68 Atl. 130; *Bridgers v Taylor*, 102 N.C. 86, 8 S.E. 893; *Boyd v L. Ritter Lumber Co.*, 119 Va. 348, 89 S.E. 273; *Black v State*, 113 Wis. 205, 89 N.W. 522.

⁸⁹ *Harrill v Davis*, 168 Fed. 187; *Russell v Jordan*, 58 Colo. 445, 147 Pac. 693; *Mann v Carter*, 74 N.H. 345, 68 Atl. 130; *Melby v Anderson (S.D.)* 266 N.W. 135. Also see *Miles v Miles*, 76 Mont. 375, 247 Pac. 328; *Hard v Depaoli*, 56 Nev. 19, 41 Pac. (2) 1054.

⁹⁰ *Meadow v Riggert (Neb.)* 272 N.W. 238; *Napier v Mooneyham (Tex.)* 94 S.W. (2) 564.

⁹¹ *Murphy v Province*, 153 Ark. 240, 240 S.W. 421; *Kidd v Jacksonville*, 97 Fla. 297, 120 So. 556; *Idol v Louisville, etc., R. Co.*, 203 Ky. 81, 261 S.W. 878; *In re Iroquois Beverage Co.*, 195 N.Y.S. 236, 118 Misc. 552; *Fennell v Trinity Portland Cement Co. (Tex. C. Apl.)*, 209 S.W. 796. Also see *U.S. Fidelity & Guaranty Co. v First Nat. Bank*, 224 Ala. 375, 140 So. 755 (highway code); *Taylor v Jonesboro Trust Co.*, 183 Ark. 903, 39 S.W. (2) 326 (national banking act); *People ex rel Mosbacker v Graves*, 5 N.Y.S. (2) 553, 254 Ap. Div. 438 (income tax).

⁹² *U.S. v Lecato*, 29 Fed. (2) 694 (Probation Law); *Marshall v A. F. Mahoney Co.*, 52 Fed. (2) 74 (Longshoremen's Compensation Act); *City of Tulsa v Clark*, 119 Okla. 122, 249 Pac. 286. Also see *Capital Traction Co. v Hof*, 174 U.S. 1, 43 L.Ed. 373, where the statute adopted applied to the District of Columbia.

placed on a state statute by the highest court in the state, if such statute was copied into a federal statute, would not under all circumstances be binding on the federal court.⁹³ Statutes adopted from the law of England, however, will bear the construction placed thereon by the English courts.⁹⁴

§ 235. Exceptions, Limitations and Qualifications to the General Rule With Reference to Adopted Statutes.—But the general rule which we have just discussed,⁹⁵ is not an absolute one;⁹⁶ rather it is subject to numerous exceptions, limitations and qualifications.⁹⁷

In the first place, the rule will not be applied where the construction is contrary to the constitution of the adopting state,⁹⁸ or contrary to the spirit and policy of its laws.⁹⁹ Nor is it applicable if the construction is unsound in principle and against the weight

⁹³ U.S. ex rel Demacrois v Farrell, 87 Fed. (2) 957.

⁹⁴ Interstate Commerce Comm. v Baltimore, etc., R. Co., 145 U.S. 263, 12 S.Ct. 844, 36 L.Ed. 699; Pennock v Dialogue (U.S.) 2 Pet. 1, 7 L.Ed. 327 (patent law); Robinson v Belt, 187 U.S. 41, 23 S.Ct. 16, 47 L.Ed. 65 (statute of limitations); Warner v Texas R. Co., 164 U.S. 418, 17 S.Ct. 147, 41 L.Ed. 495 (statute of frauds); Knight v Rawlings, 205 Mo. 412, 104 S.W. 38 (statute of frauds); Munson v Hallowell, 26 Tex. 475 (statute of limitations); Salyers Guardian v Keeton, 214 Ky. 643, 283 S.W. 1015 (statute relating to waste); Corbett's Case, 270 Mass. 162, 170 N.E. 56 (compensation to employees of independent contractors). Also see State v Grubstake Inv. Ass'n (Tex.) 272 S.W. 527, for adoption of Mexican statute.

⁹⁵ See § 234, supra.

⁹⁶ Lewis v State, 32 Ariz. 182, 256 Pac. 1048; Sutton v Heinzie, 84 Kan. 756, 115 Pac. 560; Conner v Parsley, 192 Ky. 827, 234 S.W. 972; Moore v O'Leary, 180 Mich. 261, 146 N.W. 661; Pratt v Miller, 109 Mo. 78, 18 S.W. 965; Menteberry v Gracometto, 51 Neb. 7, 267 Pac. 49; Rogers v Atlantic, etc., Co., 213 N.Y. 246, 107 N.E. 661; Auls v Starbard, 89 Ore. 284, 173 Pac. 664; State v Meath, 84 Wash. 302, 147 Pac. 11.

⁹⁷ Kraus v Chicago, etc., R. Co., 16 Fed. (2) 79; State v Campbell, 73 Kan. 688, 85 Pac. 784; Hutchinson v Kruger, 34 Okla. 23, 124 Pac. 591.

⁹⁸ Bowers v Smith, 111 Mo. 45, 20 S.W. 101; Thompson v Smith, 102 Okla. 150, 227 Pac. 77; Risser v Hoyt, 53 Mich. 185, 18 N.W. 611.

⁹⁹ White v White (Ark.) 116 S.W. (2) 616; State ex rel Packhard v Cook, 108 Fla. 157, 146 So. 223; Rigg v Wilton, 13 Ill. 15; Sutton v Heinzie, 84 Kan. 756, 115 Pac. 560; Moore v O'Leary, 180 Mich. 261, 146 N.W. 661; Pratt v Miller, 109 Mo. 78, 18 S.W. 965; Clay v Edwards, 84 N.J. 221, 86 Atl. 548; Valjago v Carnegie Steel Co., 226 Pa. 514, 75 Atl. 728. Nor, if contrary to the course of development of Pennsylvania law. In re Miller's Trust, 313 Pa. 18, 169 Atl. 362.

of authority,¹⁰⁰ or contrary to the construction placed upon similar provisions by the courts of the adopting state,¹⁰¹ or if there is no sound reason why the foreign construction should be followed,¹⁰² and especially where it is deemed clearly wrong by the courts of the adopting state.¹⁰³ And, of course, the rule is not applicable unless the statute is ambiguous or of uncertain meaning.¹⁰⁴

If the legislature clearly indicates, expressly or by implication, that it does not intend to adopt the foreign construction, obviously, the rule is inapplicable.¹⁰⁵ Accordingly, where the adopted statute differs substantially from its form in the foreign state, it will not be presumed that the foreign construction has been adopted.¹⁰⁶

¹⁰⁰ *State v Chaplain*, 101 Kan. 413, 166 Pac. 238; *State v Stewart*, 57 Mont. 144, 187 Pac. 641; *Rhea v State*, 63 Neb. 461, 88 N.W. 788, 97 N.W. 1070; *Dow v Simpson*, 17 N.M. 357, 132 Pac. 568; *Phillips v Braham*, 19 Ohio N.P.N.S. 229; *State v DeWeese*, 51 Utah 515, 172 Pac. 290.

¹⁰¹ *Sutton v Heinzie*, 85 Kan. 332, 116 Pac. 614, reh. den. 84 Kan. 756, 115 Pac. 560. This is also the rule where the adopting state has given an interpretation of its own to the adopted statute prior to its adoption. See *State v Chaplain*, 101 Kan. 413, 166 Pac. 238; *Consumers Gas & Fuel Co. v Erwin* (Tex. Civ. Ap.) 243 S.W. 500.

¹⁰² *Jacobs v Jacobs*, 136 Minn. 190, 161 N.W. 525; *Armijo v Armijo*, 4 N.M. 57, 13 Pac. 92; *State v Brunn*, 145 Wash. 435, 260 Pac. 990. And note the interesting exception in *McKenzie v Missouri Stables*, 225 Mo. Ap. 64, 34 S.W. (2) 136, where the court held that the construction of a sister state should not be followed or regarded as adopted, when such construction has not met with popular approval in the sister state, unless the construction is inescapable. Apparently, this view may be justified through reasoning that the legislature surely did not intend to enact a law which had not met with popular approval in a sister state. Similarly, it will not be presumed that the legislative body would do a futile thing. Consequently, where the legislature adopted the inheritance act of New York, it cannot be presumed to have adopted the decision of the highest New York court holding the provision for assessment of the tax on the non-exercise of a power of appointment derived from the disposition of property unconstitutional. *People v Cavenee*, 368 Ill. 399, 14 N.E. (2) 232.

¹⁰³ *Ancient Order of Hibernians v Sparrow*, 29 Mont. 132; *In re Reynolds Estate* (Utah) 62 Pac. (2) 270.

¹⁰⁴ *Pratt v Miller*, 109 Mo. 78, 18 S.W. 965; *Torrance v Edwards* (N.J.) 99 Atl. 136. Also see Note, Ann. Cas. 1917B, 654.

¹⁰⁵ *In re Murphy's Estate* (Mont.) 43 Pac. (2) 233; *Peery v Fletcher*, 93 Ore. 43, 182 Pac. 143.

¹⁰⁶ *Allen v St. Louis Nat. Bank*, 120 U.S. 20, 7 S.Ct. 460, 30 L.Ed. 573; *Richmond v Moore*, 107 Ill. 429; *Moore v O'Leary*, 180 Mich. 261, 146 N.W. 661; *McFarland v Stone*, 17 Vt. 165. Also see *Hutchinson v Krueger*, 34 Okla. 23, 124 Pac. 591, where a change was made by amendment after the decisions construing the original were rendered but before adoption.

Nor will the courts be bound by the construction placed on an adopted statute by other states which have also adopted it,¹⁰⁷ although such construction may be highly persuasive.¹⁰⁸ In other words, it is the construction existing in the original state at the time the statute was adopted that accompanies the adoption.¹⁰⁹ Moreover, in accord with this limitation, the decisions subsequent to the adoption of the statute will in no matter affect its construction, so far as the adopting state is concerned.¹¹⁰ Therefore, if the original state has never construed the statute prior to its adoption, a construction placed upon it by the original state, after the adoption, does not accompany or follow the statute.¹¹¹

And not only must the construction be the act of a court of last resort,¹¹² but it must also have acquired a fixed status in the

¹⁰⁷ *Stewart v Stewart*, 199 Calif. 318, 249 Pac. 197; *Holloway v Wetzel (Utah)* 45 Pac. (2) 565, 98 A.L.R. 1006.

¹⁰⁸ *Hard v Depaoli (Nev.)* 41 Pac. (2) 1054.

¹⁰⁹ *Stutsman County v Wallace*, 142 U.S. 293, 12 S.Ct. 227, 35 L.Ed. 1018; *Jett v Turner*, 215 Ala. 252, 110 So. 702; *McIlroy v Fugitt*, 182 Ark. 1017, 33 S.W. (2) 719; *Germania Ins. Co. v Ross-Lewin*, 24 Colo. 43, 51 Pac. 488; *Wilcox v Vierd*, 330 Ill. 571, 162 N.E. 170; *Goodell v Yezerski*, 170 Mich. 578, 136 N.W. 451; *Gilman v Central Vermont Ry. Co.*, 93 Vt. 340, 107 Atl. 122, 16 A.L.R. 1102.

¹¹⁰ *Wilcox v Bierd*, 330 Ill. 571, 162 N.E. 170. But, of course, such a construction may be used persuasively. *Wyoming Coal Min. Co. v State*, 15 Wyo. 97, 87 Pac. 337. Also note *Colver v McInturff*, 112 Kan. 604, 608, 212 Pac. 908: "If it has ever been held that the legislature in re-enacting a statute of its own state is regarded as accepting an interpretation placed upon the same language by the court of the state in which it was first used, in the course of an opinion handed down after it had been copied by the other, such search as we have had opportunity to make has failed to discover it, and the logic of such a decision, if found, would not appeal to us strongly."

¹¹¹ *Stutsman County v Wallace*, 142 U.S. 293, 12 S.Ct. 227, 35 L.Ed. 1018; *Rhoads v Chicago, etc., R. Co.*, 227 Ill. 328, 81 N.E. 371; *Goodell v Yezerski*, 170 Mich. 578, 136 N.W. 451; *Myers v McGavock*, 39 Neb. 843, 58 N.W. 522; *Baumgarten v Cohn*, 141 Wis. 315, 124 N.W. 288. Also see *Powell v Ford Motor Co. (Mo.)* 78 S.W. (2) 572. As a result, where a statute is adopted before being construed, the courts are free to put their own construction on it. *Ditsch v Finn*, 214 Wis. 305, 252 N.W. 562.

¹¹² *Andrews v Hovey*, 124 U.S. 694, 8 S.Ct. 676, 31 L.Ed. 557; *Osborne v Home Life Ins. Co.*, 123 Calif. 610, 56 Pac. 616. But see *Clay v Edwards*, 84 N.J.L. 221, 86 Atl. 548, where it was held that the decisions of the lower courts of a foreign state were entitled to consideration. Also see § 234, note 87, *supra*.

jurisprudence of the state of origin,¹¹³ before it will accompany the adoption.

§ 236. Uniform State Laws.—There has developed in late years what would seem a commendable tendency in the various states to enact uniform laws upon certain subjects, such, for example, as negotiable instruments and sales. Upon the adoption or enactment of one of these uniform acts, the question promptly arises whether the new law shall be construed according to established local principles or doctrines, or whether the uniform construction of other states should be adopted. Probably the trend is toward the acceptance of the uniform construction of other states,¹¹⁴ although there is considerable authority to the contrary.¹¹⁵ It is clear, however, if the uniform act is to achieve its purpose, it should not be interpreted according to established local doctrines.¹¹⁶ Accordingly, in construing such acts, the court may resort to the holdings in

¹¹³ *Pratt v Miller*, 109 Mo. 78, 18 S.W. 965. And see *Peoples Gas Light & Coke Co. v Ames*, 359 Ill. 152, 194 N.E. 260 (attorney general's opinion entitled to but little weight).

¹¹⁴ *Commercial Nat. Bank v Canal-Louisiana Bank*, 239 U.S. 520, 36 S.Ct. 194, 60 L.Ed. 417; *Salt River Valley Water Users v Peoria Ginning Co.*, 27 Ariz. 145, 231 Pac. 415; *National City Bank v National Bank of Republic*, 300 Ill. 103, 132 N.E. 832, 22 A.L.R. 1153; *Vander Ploeg v Van Zuuk*, 135 Iowa 350, 112 N.W. 807; *Lightner v Roach*, 126 Md. 474, 95 Atl. 62; *Walker v Dunham*, 135 Mo. Ap. 396, 115 S.W. 1086; *Rope v Ferguson*, 82 N.J.L. 566, 83 Atl. 353; *Brown v Rowan*, 91 Misc. Rep. 220, 154 N.Y. Supp. 1098; *Rockford v First Nat. Bank*, 77 Ohio S. 311, 83 N.E. 392; *Union Trust Co. v McGinty*, 212 Mass. 205, 98 N.E. 679. For additional treatment of Uniform State Laws, see *infra*, § 347.

¹¹⁵ *Hackley v Magee*, 128 La. 1008, 55 So. 656; *Farrington v F. E. Fleming Co.*, 94 Neb. 108, 142 N.W. 297; *Haddock v Haddock*, 192 N.Y. 499, 85 N.E. 682; *First Nat. Bank v Wyndmere*, 15 N.D. 299, 108 N.W. 546.

¹¹⁶ "The design was to obliterate state lines—to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several states, and to make plain, certain and general the controlling rules of law. Diversity was to be molded into uniformity . . . It ought to be interpreted in such a way as to give effect to the beneficent design of the legislature in passing an act for the promotion of harmony upon an important branch of the law." *Union Trust Co. v McGinty*, 212 Mass. 205, 98 N.E. 679. Also see *Sicherman*, *Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation* (1916) 2 A.B.A.J. 60, and *Note* (1915) 29 Harv. L.Rev. 541; also see *Forgan v Smedal*, 203 Wis. 564, 234 N.W. 896.

other jurisdictions where the act is also in force,¹¹⁷ and give such decisions considerable weight.¹¹⁸

Nevertheless, even though the provisions in uniform state laws should be interpreted so as to secure uniformity, it is not necessary that such uniformity be maintained in matters outside the scope of the act and affecting it only incidentally.¹¹⁹ Nor is there any presumption that the legislature intends to adopt a prior conflicting construction of similar provisions in other states.¹²⁰

§ 237. The Risks Attending Construction With Reference to Other Statutes.—While it must be admitted that valuable and often indispensable assistance in ascertaining the legislative intent in a given statute may be derived by construing it in the light of other statutes, it must also be recognized that certain dangers exist. Unless, the interpreter proceeds with caution, the legislative intention may be completely lost. Often, where statutes in *pari materia* are consulted, it is not easy to determine what statutes may be properly considered. Some may be included which should not, and others excluded which should be considered in *pari materia*. In either event, there is danger that the legislative intent may remain unknown. Only by considering each and every statute in *pari materia*, and no others, can a statute be placed in the proper position for construction. Otherwise, the court is as likely to misinterpret the statute as it would fail to grasp the true meaning of a sentence should it delete certain words or add words to those which already appear.

Where reference is made to the former law by the court in its effort to ascertain the legislative intent in a re-enacted statute, while it may be presumed that the latter is intended to carry with it the constructions placed upon the former by the courts and the administrative departments, frequently the presumption, although not rebuttable, is contrary to fact. In many instances, it is doubtful whether the legislature had any knowledge covering the constructions placed upon the original statute. Of course, where the statute is re-enacted in the identical language of the prior law, the danger

¹¹⁷ *Valentine v Hayes*, 102 Fla. 157, 135 So. 538 (Uniform Negotiable Instruments Act); *Ritcher v Zoccoli*, 8 N.J. Misc. 289, 150 Atl. 1 (construing "F.O.B. Factory" in Uniform Sales Act.)

¹¹⁸ *Farmers & Merchants Bank v Weffold*, 200 Wis. 5, 227 N.W. 234.

¹¹⁹ *Edgerly v Equitable Life Assur. Soc.*, 237 Mass. 238, 191 N.E. 415.

¹²⁰ *Howth v Case Threshing Machine Co.*, 116 Tex. 434, 293 S.W. 800.

of the presumption being without foundation in fact, is probably remote. But where the language has been altered, even though but slightly, it would seem logical that the alteration was for some reason or purpose. True, it may have been intended to express the same idea in a more concise or certain manner. Yet, it may be as logical and reasonable to assume that a change was intended. Consequently, if too much reliance is placed upon the condition of the former law, that law instead of the later enactment will be given controlling force, with the inevitable result that the last legislative intent may be defeated. More than that, there is the suggestion that the judicial or administrative department will actually legislate.

Where an adopted statute is referred to by the court, there is more danger attached in most instances than exists when re-enacted statutes are involved. Undoubtedly, it is not always easy to determine what construction has been placed upon an adopted statute by the state from which it was adopted. In many cases, one cannot be sure that the legislature of the adopting state was familiar with the construction of the state which first enacted the statute. The case of *People v. Cavanee*,¹²¹ seems to be an example. There, the legislature of Illinois adopted the inheritance tax law of New York notwithstanding the fact that the highest court of the latter state had previously declared part of it unconstitutional. Although the Illinois court refused to regard the adoption as carrying with it the New York construction on the ground that it could not be presumed that the legislature intended to do a futile thing, it would seem just as reasonable to suppose that the legislature were unfamiliar with the action of the New York courts upon the adopted statute.

It would seem probable that the many qualifications, limitations, and exceptions to the rule which presumes that the construction placed upon an adopted law follow the law, have been necessary because of the tendency of the rule to defeat the legislative intent.

Where uniform state laws are involved, however, the danger connected with adopted laws generally, largely disappears, or is at least considerably less acute. In all probability, the lawmakers are familiar with the meaning of statutes of this type. It is difficult to account for any effective effort to achieve uniformity without the existence of a substantial knowledge of the terms of the statute and how the courts in other jurisdictions had interpreted them.

¹²¹ 368 Ill. 399, 14 N.E. (2) 232.

What then is the true status of other statutes in the interpretative process? As most decisions indicate, whatever assistance may be found in them, functions as a rebuttable presumption or simply persuasively in favor of the construction suggested or indicated by the statutes thus considered. But the basic rule must not be lost sight of, that the words of the statute subjected to construction constitute the primary source from which the legislative meaning must be ascertained. Only when doubt still remains after that source has been exhausted, does it seem proper to examine other statutes, although it is doubtful whether any valid objection can be urged against resorting to other statutes simply in order to corroborate the construction reasonably indicated by the primary source as the legislative intention. Or, should the primary source reasonably indicate either of several constructions, the consideration of other statutes would be proper as additional indication that one was the correct construction. All extrinsic aids, including other statutes, however, should be considered and weighed, for danger lurks in simply examining one of such aids and determining the legislative intent from it alone.

Perhaps the danger in considering other statutes is after all less than the danger attached to refusing to call them to our aid, especially if we believe in resorting to any possible aid that may tend to reveal the legislative intent so that it may be made effective. And if we adhere to the view that even unambiguous statutes must actually be construed in order to discover the legislative meaning, since statutes in *pari materia* are as much a part of the primary source from which to ascertain the legislative intent as are the very words of the act under consideration, the failure to consider statutes in *pari materia* would in numerous instances defeat the legislative intent. For how can we determine the law upon a given subject, if we seek the law and its meaning only from a part of it?

CHAPTER XXIII

STRICT AND LIBERAL CONSTRUCTION.

- § 238. In General.
- § 239. A Rational Basis for Determining What Statutes Shall Be Strictly Construed.
- § 240. Criminal and Penal Statutes, Generally.
- § 241. Statutory Provisions for Construction of Penal Acts.
- § 242. The Rule of Strict Construction of Penal Statutes Criticized.
- § 243. Statutes Part Penal and Part Remedial.
- § 244. Statutes in Derogation of Sovereignty.
- § 245. Legislative Grants.
- § 246. Statutes in Derogation of Common Right.
- § 247. Reasons for Strict Construction of Statutes in Derogation of Common Right and Some Illustrative Cases.
- § 248. Statutes in Derogation of the Common Law.
- § 249. Some Illustrative Cases.
- § 250. The Rule of Strict Construction of Statutes in Derogation of the Common Law Justified.
- § 251. Remedial Statutes.
- § 252. Reason for the Liberal Construction of Remedial Statutes Generally.
- § 253. Barriers to the General Application of the Rule of Liberal Construction to All Remedial Acts.
- § 254. Statutes Pertaining to Remedies and Procedure—In General.
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- § 256. Statutes Simplifying Procedure—Rules of Court.
- § 257. Taxation and Revenue Acts, Generally.
- § 258. Exemption from Taxation, Tariff Acts, and Laws to Prevent Fraud on the Revenue.
- § 259. The Liberal Construction of Tax and Revenue Acts.
- § 260. Private, Special, or Local Laws.

§ 238. In General.¹—The rule that subjects certain legislative enactments to a strict construction and others to a liberal construction, is one well founded in our law, although in recent years there has been a tendency towards its abrogation.² In spite of this tendency, however, the rule is still of great importance in most, if not all, jurisdictions, and will undoubtedly continue to remain so.

If a statute is to be strictly construed, nothing should be in-

¹For a good discussion of liberal and strict construction, generally, see Black, *Int. Laws*, §§ 133-146.

²See § 241, *infra*; also §§ 417-418, *infra*.

cluded within its scope that does not come clearly within the meaning of the language used.³ Its language must be given its exact and technical meaning, with no extension on account of implications or equitable considerations;⁴ or, as has been aptly asserted, its operation must be confined to cases coming clearly within the letter of the statute as well as within its spirit or reason.⁵ Or stated perhaps more concisely, it is the close and conservative adherence to the literal or textual interpretation.⁶ It also raises the presumption that the legislature intends to make the least possible innovation on existing law.⁷

But the rule of strict construction is not applicable where the meaning of the statute is certain and unambiguous, for under these circumstances, there is no need for construction.⁸ If the language is clear, it is conclusive of the legislative intent,⁹ for the object of all construction is simply to ascertain that intent,¹⁰ and, of course, the rule of strict construction is subordinate thereto.¹¹ Nor does it

³ U.S. v Wiltberger, 5 Wheat (U.S.) 76, 5 L.Ed. 37; Arms v Ayer, 192 Ill. 601, 61 N.E. 851; State v Lowry, 166 Ind. 372, 77 N.E. 728; State v Bland, 144 Mo. 534, 46 S.W. 440, 41 L.R.A. 297; Bullington v Lowe, 94 Okla. 234, 221 Pac. 502; Jennings v Common., 109 Va. 821, 63 S.E. 1080; Johns Military Academy v Edwards, 143 Wis. 551, 128 N.W. 113.

⁴ Warner v Connecticut Mut. Life Ins. Co., 109 U.S. 357, 3 S. Ct. 221, 27 L.Ed. 962; Barber Asphalt Paving Co. v Watt, 51 La. Ann. 1345, 26 So. 70; Stanyan v Town of Peterborough, 69 N.H. 372, 46 Atl. 191. And see the following cases where the meaning of the words of a statute was altered by a reasonable construction in order to avoid mischievous or absurd consequences: U.S. v Hogg, 112 Fed. 909; Carrigan v Stillwell, 99 Me. 434, 59 Atl. 683, 68 L.R.A. 386; Mendles v Danish, 74 N.J.L. 333, 65 Atl. 888.

⁵ State v Powers, 36 Conn. 77. Also note cases under note 3, supra.

⁶ State v Graham, 38 Ark. 519; Melody v Reab, 4 Mass. 473; and see Austin v State, 71 Ga. 595.

⁷ See Shorey v Wyckhoff, 1 Wash.T. 348.

⁸ Kellar v James, 63 W.Va. 139, 59 S.E. 939; St. John's Military Academy v Edwards, 143 Wis. 551, 128 N.W. 113.

⁹ Osaka v U.S., 84 Fed. (2) 482, aff'd 57 S.Ct. 356.

¹⁰ Osaka v U.S., 84 Fed. (2) 482, aff'd 57 S.Ct. 356.

¹¹ Y.W.C.A. v Portsmouth (N.H.) 192 Atl. 617. "It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." United States v Wiltberger (U.S.) 5 Wheat. 76, 5 L.Ed. 37.

apply with the same degree of strictness to every statute subject to strict construction but with degrees varying according to the severity of the statute's effect;¹² or perhaps more accurately, as will appear more clearly later on, according to the interpreter's conception as to what should or should not be included within the statute's scope. Penal and criminal statutes, statutes in derogation of common rights and of the common law, statutory grants, statutes authorizing summary proceedings, and most tax laws are among the enactments usually subject to strict construction.

On the other hand, there are many statutes which will be liberally construed. Where this is the case, the meaning of the statute may be extended to matters which come within the spirit or reason of the law or within the evils which the law seeks to suppress or correct,¹³ although, of course, the statute can under no circumstances be given a meaning inconsistent with, or contrary to the language used by the legislators.¹⁴ Consequently, any matter reasonably within the statute's meaning, may be included within the statute's scope, unless the language necessarily excludes it.¹⁵

But a liberal construction does not require that words be accorded a forced, strained, or unnatural meaning,¹⁶ or warrant an extension of the statute to the suppression of supposed evils or the effectuation of conjectural objects and purposes not referred to,

¹² *Common. v Fisher*, 17 Mass. 46 (criminal), *Modern Woodmen of America v Wieland*, 109 Mo.Ap. 340 (retrospective). "We should also remember that 'strict construction' is not a precise, but a relative expression; it varies in degree of strictness according to the character of the law under construction. It is not the exact converse of liberal construction, for it does not consist in giving words the narrowest meaning of which they are susceptible." *Cummins v Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W. (2) 920, 925.

¹³ *In re Johnson's Estate*, 98 Calif. 531, 33 Pac. 460, 21 L.R.A. 380; *State v Malusky*, 59 N.D. 501, 230 N.W. 735, 71 A.L.R. 190; *Kellar v James*, 63 W.Va. 139, 59 S.E. 939. Also see *Shorey v Wyckhoff*, 1 Wash.T. 348. "We are of the opinion that the term 'liberal construction' means to give the language of a statutory provision, freely and consciously, its commonly, generally accepted meaning, to the end that the most comprehensive application thereof may be accorded, without doing violence to any of its terms." *Maryland Casualty Co. v Smith (Tex.)* 40 S.W. (2) 913.

¹⁴ *In re Johnson's Estate*, 98 Calif. 531, 33 Pac. 460, 21 L.R.A. 380.

¹⁵ *State v Powers*, 36 Conn. 77.

¹⁶ *In re Johnson's Estate*, 98 Calif. 531, 33 Pac. 460, 21 L.R.A. 380; *Cogshall v City of Des Moines*, 138 Iowa 730, 117 N.W. 309.

nor indicated in any of the terms used.¹⁷ In other words, a liberal construction resolves all reasonable doubt in favor of the applicability of the statute.¹⁸ And chief among the statutes subject to liberal construction, are remedial statutes, statutes pertaining to remedies and procedure, and curative acts.

In a number of situations, however, the rules pertaining to strict and liberal construction will not be followed. For instance, they will not be adhered to where to do so will defeat the purpose of the statute,¹⁹ or where absurd results will occur.²⁰ And their application may be affected by other rules of construction.²¹

An illustration of the application of the rule of strict construction will be found in *Commonwealth v Goldman* (205 Mass. 400, 91 N. E. 392) where the question arose whether an automobile was included in a statute which read, in part, as follows: "Whoever—with intent to cheat or defraud the owner thereof—refuses to pay for the use of a horse or carriage the lawful hack or carriage fare established therefor by any city or town, shall be punished by a fine of not more than twenty dollars or by imprisonment for not more than two months, or by both such fine and imprisonment." Clearly, under a liberal construction, the word "carriage" would include an automobile, but not under a strict construction—a construction adopted by the court in this case. In *Surace v Danna* (248 N. Y. 18, 161 N. E. 315) will be found an application of the rule of liberal construction. In this case, the workmen's compensation act provided that "benefits due—— shall not be assigned, released or commuted——, and shall be exempt from all claims of creditors and from levy or collection of a debt", and the court rejected a judgment creditor's claim that such benefits become subject to seizure as soon as they are paid so that money on deposit in a bank representing such benefits could be reached by garnishment.

¹⁷ *Kellar v James*, 63 W.Va. 139, 59 S.E. 939.

¹⁸ *State v McCrystol*, 43 La. Ann. 907, 9 So. 922.

¹⁹ *Sweetser v Lowell*, 236 Fed. 169, 149 C.C.A. 359. Also see cases under notes 8 and 14, *supra*.

²⁰ *Sweetser v Lowell*, 236 Fed. 169, 149 C.C.A. 359; *Rawson v State*, 19 Conn. 292.

²¹ *U.S. v Raynor*, 302 U.S. 540, 58 S.Ct. 353 (history). The *Harriet*, 1 Story 251, Fed. Cas. No. 6,099 (*pari materia*); *Rawson v State*, 19 Conn. 292 (absurd results); *Regan v Ensley*, 283 Mo. 297, 222 S.W. 773 (mandatory construction). Also see § 173, *supra*.

As we have already suggested, one cannot but be impressed with the fact that after all, in most cases, interpretation generally boils down to the sole problem whether the statute involved shall be strictly or liberally construed; that is, whether what has been aptly called a "determinate" shall be included or excluded from the statute's operation. If it is to be included, then the statute will be liberally construed; if it is to be excluded, then it should be strictly construed. Almost any problem of interpretation basically involves this judicial attitude. Consequently, the type of construction to which the court will subject a statute is a most important consideration.

§ 239. A Rational Basis for Determining What Statutes Shall Be Strictly Construed.—While the conclusion cannot be avoided that in most cases whether a statute will be given a liberal or a strict construction will depend upon whether the court thinks a given "determinate" should be included or excluded from the statute's operation, it is a factor of great importance. Yet to make the type of construction turn upon the wish of the interpreter, does not necessarily constitute a satisfactory basis upon which to decide the nature of the construction to be applied to a given statute. It is too uncertain and unpredictable. If some basic test could be found by which one might ascertain whether the legislative enactment should be liberally or strictly construed, the legislative intention would become far more predictable. Do the courts apply such a test today? Is such a test capable of ascertainment and statement? These are important inquiries whose answers might make the interpretative process appear much more logical than it now seems to be.

An examination of the cases reveals that, aside from the wish of the interpreter, whether a statute will be liberally or strictly construed seems generally to depend upon the type or nature of the statute involved.^{21a} Certain statutes, such as penal and criminal

^{21a} *LaFogues v Waggoner*, 189 Ark. 757, 75 S.W. (2) 235, *Texas Employers' Ins. Assn. v City of Tyler* (Tex. Civ.Ap.) 283 S.W. 929, rev. on other grounds, 288 S.W. 409. Also see *State v O'Neil*, 147 Iowa 513, 126 N.W. 454: "In criminal cases, where the life or liberty of an individual is involved on one side, and the enforcement of law in the interest of the public welfare on the other, no private right of contract or property being imperiled by liberality of construction, the courts go further than in civil cases to recognize the common judgment of humanity as to what is right and just, and they allow many exceptions to statutory definitions of what shall constitute crime."

statutes, are construed strictly against the state, while others, such as statutes of a remedial nature, are liberally construed. Similarly, statutes in derogation of common rights and of the common law are subjected to a strict construction in favor of the citizen, while acts in derogation of sovereignty are strictly construed in favor of the government.

It would seem probable that a common distinctive difference exists between the statutes subject to a strict construction and those subject to a liberal construction. Yet, when we reconsider the results of our examination of the various cases on the subject, and realize that often the same statute in its several parts is subjected to different types of construction, doubt is created whether the type of the statute can be relied upon as the factor truly determinative of the construction which should be accorded to it. Nevertheless, must not there be some great, general basic reason for adopting different types of construction in different cases—a reason which will either justify the practice in our courts of resorting to strict or liberal construction, or indicate the practice has no foundation upon which to stand? Undoubtedly, there is strong indication that some factor exists which should, or actually does, determine the type of construction to be used in a given case.

Why should a statute be subjected to a strict or a liberal construction, as the case may be? The only answer that can possibly be correct is because the type of construction utilized gives effect to the legislative intent. Sometimes a liberal construction must be used in order to make the legislative intent effective, and sometimes such a construction will defeat the intent of the legislature. If this is the proper conception concerning the rule of construction to be adhered to, then a strict or a liberal construction is simply a means by which the scope of a statute is extended or restricted in order to convey the legislative meaning. If this is the proper position to be accorded strict and liberal constructions, it would make no difference whether the statute involved was penal, criminal, remedial or in derogation of common right, as a distinction based upon this classification would then mean nothing. On the contrary, to take a penal statute as an example, it might be subject to a strict or a liberal construction depending upon which would effectuate the legislative intent. If this is the proper sphere of strict and liberal construction, the nature of the construction to be given a statute affords no assistance in ascertaining the legislative intent.

Strict and liberal constructions should be used as instruments in the process of ascertaining the legislative intent when it is in doubt; otherwise, they have little or no value. They should be able to assist the court in ascertaining the legislative meaning. Yet the courts seem to use different types of construction largely in the application of the statute. Of course, this is a part of the interpretative process, and the use of strict and liberal construction in this connection is an important step in making the legislative intent effective; but even here we find no clear cut standard announced by which to determine when to resort to strict construction and when to resort to liberal construction, unless it be the just and reasonable operation of the statute.

It is surely an unobjectionable standard if the court will determine the scope and extent of a statute's operation on the basis whether in a given case the suggested construction is just and reasonable, as determined by existing standards of what is right and wrong, equitable and inequitable, reasonable and unreasonable. As has been pointed out time after time in this treatise, we must presume that the legislature intends that its pronouncements will operate fairly, reasonably and equitably. More than that, if we adhere to the view that the legislature in enacting a statute, possibly does not have a specific intent with reference to every possible case that may arise under the statute, the standard just suggested for determining whether it shall be subjected to a strict or liberal construction, seems all the more logical. And in enacting a statute, the legislature, so it would appear, impliedly delegates to the courts the power to determine this intent—the just and reasonable operation of the law—whenever specific cases arise.

Of course, every man's conception of what is right and wrong or reasonable and unreasonable is not the same in every instance. Different outlooks on life, different associations, and a hundred other considerations inevitably influence men's conceptions of the various standards of conduct and morality. This factor presents one barrier to the basis just suggested for determining the type of construction to which a statute should be subjected. Yet, upon the great fundamental conceptions of right and reason, men generally agree. At least, society seems to have certain standards universally adhered to.

By making the type of construction turn upon the nature of the statute being subjected to the process of interpretation, a certain

amount of the objection which arises from leaving the determination entirely to the court's conception of what is just and reasonable, is removed. Or perhaps better, whether a statute shall be subjected to a liberal or strict construction should depend upon the nature of the right involved. This would eliminate the objection to allowing the character of the statute to be determinative of the type of construction, where the statute may partake of several natures—being part penal and part remedial, or part remedial and part in derogation of the common law or common right.

Undoubtedly, certain human rights are so valuable and essential that the law looks upon them with favor at all times. Any tendency toward their impairment or destruction should be avoided or limited as much as possible. Any method or means set up for the promotion and protection of such rights should at all times be favored. In a democracy, at least, certain rights are regarded beyond the encroachment of the government; there are certain matters in which man is superior to the government. Even with reference to rights which the government may reasonably regulate for the benefit of the general good, there is a limit beyond which the government cannot go. All men are endowed "with certain inalienable rights, that among these are life, liberty and the pursuit of happiness".

Of course, the problem is to know when individual rights must give way to the general welfare. On one side of the dividing line, the statute should always be liberally construed in favor of the individual; on the other side, the statute might perhaps be liberally construed in favor of the public. While public welfare may be a superior consideration beyond a certain point, it should not be so regarded any further than is clearly compatible with the democratic philosophy of government. There is undoubtedly a limit to the right of society in general to regulate or limit individual rights, although its boundary may not be well defined. As the court said in *Nolan v Jones* (263 Pa. 124, 106 Atl. 235), "to justify the state in . . . interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means (employed) are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals."

It would therefore seem that any statute pertaining to the promotion and protection of individual rights, at least so long as these rights are beyond the legitimate control or regulation of the govern-

ment, is entitled to be liberally construed in favor of the individual in a contest with the government. When the right of the individual reaches the point that it may from there on be regulated in behalf of the public, then perhaps a liberal construction in favor of the public is not out of place, as we have already suggested. At least, such an attitude may be found in *Hipp v Prudential Casualty Co.* (60 S. D. 300, 244 N. W. 346) :

“The law was enacted, not for the benefit of the insurance company nor for the benefit of the bus company, but for the sole benefit of the public. It is not the intent of the law to permit a bus company to insure certain specified vehicles used in its business and leave others uninsured.”

Such an attitude may be proper where the state exercises its police power for the benefit of *all* the people. Consequently, if the police power is exercised for the benefit of certain groups or classes as distinguished from the public at large, the statute should surely be strictly construed. An individual should not have his personal rights impaired or sacrificed simply to advance the welfare of other individuals, unless the statute clearly calls for such a sacrifice. Naturally, where the entire public welfare is involved, often individual rights must be subservient thereto.

Nevertheless, even where the public welfare is involved, highly important as individual rights are, and realizing how easily they may be impaired or destroyed, the better judicial attitude might subject all statutes of this type to a liberal construction in favor of the individual. At least, this would lay down a rule easy of application. It seems to be the rule already applied by the courts generally in the construction of criminal statutes, even in face of the fact that they are statutes pertaining to the public welfare. It is also a rule applied to statutes which limit the general right of contract. *New York Life Insurance Company v West*, 102 Colo. 591, 82 Pac. (2) 254. As Lieber says in his *Political Hermeneutics*, Ch. 6, § 10:

“Let everything that is in favor of power be closely construed; everything in favor of the security of the citizen and the protection of the individual be liberally and comprehensively interpreted; for the simple reason, that power is power, and therefore able to take care of itself, as well as tending by its nature to increase, while the citizen may need protection.”

Indeed, as is so well stated in *Board of Education v Carmichael* (Ala.—187 So. 414), “statutes securing elementary rights are construed in favor of the citizen.” Obviously, therefore, the additional

safeguard to human rights provided by this type of construction constitutes a worthy reason for its application.

Naturally, since all persons should stand before the law on an equal footing, any statute which grants special rights to certain individuals should be strictly construed against the statutory beneficiary. This seems to be the basis for subjecting statutes in derogation of common rights to a strict construction. Moreover, where a statute regulates the conduct of public officials, since such a statute has as its purpose the promotion of the welfare of the members of the public, the statute should be liberally construed in favor of the members of the public.

One might go on and enumerate other rights and indicate the type of construction desirable in each instance. But, as will be apparent, if we make the construction turn upon the nature of the right, we will establish a basis with practically the same difficulties that exist where we make the construction depend upon the type of statute. And besides, even should we determine whether a statute should be liberally or strictly construed in the light of the right involved, the consideration of which construction will be the most productive of justice is actually the decisive factor.

After all, in accord with what we stated at the beginning of this section, the only possible basis of a rational nature, is to allow the legislative intent to be the decisive factor. Inasmuch as that intent constitutes the law of the statute, if a liberal construction will make the legislative intent effective, the statute should be given a liberal construction. Conversely, if a strict construction will make the legislative intent effective, the statute should be subjected to a strict construction. Hence, neither the nature of the statute nor the type of the right, need give the court any concern, except as they may indicate the legislative meaning. Perhaps this will lead to the present day practice of the courts. If so, perhaps the present practice is the most practicable. At least one court has expressly stated the rule to be that the statute subject to construction should receive a strict or liberal construction according to which will execute the real legislative intent. This view was taken by the court in *Alton, etc., Railroad Co. v Vandalia Railroad Co.*, 268 Ill. 68, 108 N. E. 800.

In this connection, however, it is important to keep in mind that, as so aptly stated by Dwaris, "it is not in the power of human intelligence whether combined in legislative bodies, or otherwise, to

foresee and provide beforehand, for every combination of facts, or circumstances, which may occur in the infinite variety of human affairs. . . . The lawmaker, however desirous he may be to make his code complete, can only foresee and provide for classes of cases; and in doing this, he must rather be guided by the experience of the past, than by any faculty of discerning the future." To the courts, the legislature must leave the "application of statutes to particular cases", in accord with the obvious basic legislative intent that its enactments are intended to operate reasonably and equitably as determined by our generally accepted standards of proper conduct and what is right and just. By this process alone, is it possible for our courts to maintain a workable and practical as well as an equitable system of jurisprudence, for legislatures cannot deal with all individual cases as they arise any more than they can enact legislation which will cover every conceivable human controversy. By utilizing strict or liberal construction in order to rightly determine human controversies, the courts may include or exclude those cases which apparently violate our concepts of reason and justice, from the operation of a given statute. Such a construction, so it would seem, since it appears to be primarily concerned with determining the pending controversy in accord with our general concepts of proper conduct, might well be designated as "ethical interpretation".

This sort of construction also provides a means whereby legislation is moulded to meet those changes which take place in a moving civilization. Obviously, it is impossible for the law-makers to enact a law which will unquestionably be equitably applicable for all time to come. The difficulties confronting the enactment of such a law are rather poetically, yet strikingly announced in the following translation by Dwaris:

"How arrest the action of time? How oppose the course of events or the insensible change of customs? How know and calculate in advance what experience alone can reveal to us? Can foresight ever extend to objects which thought cannot attain? Men never rest, they are ever active, and the movement, which does not stop, and whose efforts are diversely modified by circumstances, produces every moment some new combination; some new fact; some new result". *Discours Preliminaire du premier project du Code Civil*, p. 20. Dwaris (Potter) on Statutes, p. 296.

Until the legislature can, or does act, surely the use by the courts of strict or liberal construction in order to keep existing statutory

law from working rank injustices because of changes in human relations and conceptions, is not improper. If custom ultimately makes law, both statutory and common, as it surely does, might it not be said, even if we should refuse to acquiesce in the view that a strict or a liberal construction, as the case may be, may be utilized to include or exclude a given "determinate" from the statute's operation, because of the basic legislative intent that its enactments should always operate equitably, that the law created by changing human concepts and customs impliedly repeals the old law or exempts the later controversies from its operation?

It would therefore seem that whether a statute should receive a liberal or a strict construction, should depend upon which will make the legislative intent effective, such legislative intent in any case of doubt being largely determined by ethical considerations. It would seem that the "ethical interpretation" of any statute eliminates the objection to "spurious interpretation"—the exercise of legislative power by the judiciary—and at the same time provides a broad and all-comprehensive method of determining whether a statute shall be strictly or liberally interpreted.

§ 240. Criminal and Penal Statutes, Generally.²²—Criminal²³

²² As to what statutes are criminal and penal, see § 73, *supra*. Is there a distinction between a penal statute and one which does not create a crime or fix a punishment? See *State v Small*, 29 Minn. 216, 12 N.W. 703: "It is urged that this is contrary to the rule that penal statutes must be construed strictly. By this rule nothing more is meant than that penal statutes shall not, by what may be thought their spirit and equity, be extended to offenses other than those which are specifically and clearly described and provided for. The reason of the rule is that the law will not allow of constructive offenses or arbitrary punishments. Therefore, penal statutes are taken strictly and literally only in the point of defining and setting down the fact and the punishment, and not generally, in words that are but circumstances and conveyances in the putting of the case." And for history of the rule of strict construction as applicable to penal statutes, see Hall, L.—Strict or Liberal Construction of Penal Statutes, 48 Harv. L.Rev. 748 (1934).

²³ The rule of strict construction is also applicable to quasi-criminal statutes. *Wright v State (Tenn.)* 106 S.W. (2) 866, and *Avers v Phillips Petro. Co.*, 25 Fed. Supp. 458, or to statutes penal in nature. *Shultz v Morgan*, 1 Kan. Ap. 572, 42 Pac. 254.

and penal statutes must be strictly construed;²⁴ that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations.²⁵ In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which the statute was enacted.²⁶

²⁴ *Bolles v Outing Co.*, 175 U.S. 262, 20 S.Ct. 94, 44 L.Ed. 363; *Butts v Merchants', etc., Trans. Co.*, 230 U.S. 126, 33 S.Ct. 964; *Prussian v U.S.*, 282 U.S. 675, 75 L.Ed. 610, 51 S.Ct. 223; *General Motors Acceptance Corp. v Crumpton*, 220 Ala. 297; *Ex parte McNulty*, 77 Calif. 164, 19 Pac. 237; *State v McMahon*, 53 Conn. 407, 5 Atl. 596, *Ex parte Knight*, 52 Fla. 144, 41 So. 786; *Zellers v White*, 208 Ill. 518, 70 N.E. 669; *State v Lowry*, 166 Ind. 372, 77 N.E. 728; *In re Kuhn*, 125 Iowa 449, 101 N.W. 151; *State v Prather*, 79 Kan. 513, 100 Pac. 57; *Harrison v State*, 22 Md. 468; *Libby v New York, etc., R. Co.*, 273 Mass. 522, 174 N.E. 171, 73 A.L.R. 101; *People v Gadway*, 61 Mich. 285, 28 N.W. 101; *State v Maurer*, 255 Mo. 152, 164 S.W. 551; *People v Nelson*, 153 N.Y. 90, 46 N.E. 1040; *State v Health*, 199 N.C. 135, 153 S.E. 855, 97 A.L.R. 37; *State v Shawnee*, 167 Okla. 582, 31 Pac. (2) 552, 92 A.L.R. 948. It is held in some jurisdictions that this rule of construction as applicable to criminal statutes applies only to those of a high penal nature and not to misdemeanors. *Zucarro v State (Tex.)*, 197 S.W. 982; also see *State v Maurer*, 255 Mo. 152, 164 S.W. 551, that misdemeanors affecting individuals are more liberally construed than those affecting the general public. Conversely, felony statutes should receive a strict construction. *State ex rel. Cherry v Davidson*, 103 Fla. 954, 139 So. 177; *State v Holder*, 335 Mo. 175, 72 S.W. (2) 489. If the statute be penal, it should be strictly construed, especially where the act for which punishment is provided, is innocent or unintentional. *Francaise v De Navigation*, 19 Fed. (2) 773. The rule of strict construction is applicable to statutes of a criminal nature. *In re Kuhn*, 125 Iowa 449, 101 N.W. 151. It is also applicable to statutes imposing penalties, *People ex rel. Johnson v Peacock*, 98 Ill. 172, *Maxwell v Rives*, 11 Nev. 213, or forfeitures; *Coble v Shoffner*, 75 N.C. 42 (usury); *In re Kuhn*, 125 Iowa 449, 101 N.W. 151, or even damages, on the injured person. *Meidel v Anthis*, 71 Ill. 241; *Cleveland, etc., R. Co. v Wells*, 65 Ohio St. 313, 62 N.E. 332, 58 L.R.A. 651; *Kennedy v Garrigan*, 23 S.D. 265, 121 N.W. 783.

²⁵ *U.S. v Weitzel*, 246 U.S. 533, 38 S.Ct. 381, 62 L.Ed. 872; *Braffith v People of Virgin Islands*, 26 Fed. (2) 646; *People v Mooney*, 87 Colo. 567, 290 Pac. 271; *Rawson v State*, 19 Conn. 292; *State v Lloyd*, 320 Mo. 236, 7 S.W. (2) 344; *Ex parte Rickey*, 31 Nev. 82, 100 Pac. 134; *Security Finance Co. v Hendry*, 189 N.C. 549, 127 S.E. 629; *Diddle v Continental Cas. Co.*, 65 W.Va. 170, 63 S.E. 962; *State v Columbian National Life Ins. Co.*, 141 Wis. 557, 124 N.W. 502. Generally, statutes are to be construed strictly against a forfeiture. *U.S. v Batre*, 69 Fed. (2) 673.

²⁶ *In re McDonough*, 49 Fed. 360. Also see *State v Tracy (Mo.)* 29 S.W. (2) 159, where the punishment indicated that the statute did not include felonies.

Only those persons,²⁷ offenses,²⁸ and penalties,²⁹ clearly included, beyond any reasonable doubt, will be considered within the statute's operation. They must come clearly within both the spirit³⁰ and the letter³¹ of the statute,³² and where there is any reasonable doubt, it must be resolved in favor of the person accused of violating the statute;³³ that is, all questions in doubt will be resolved in favor of those from whom the penalty is sought.³⁴ For example, the word "carriage" cannot be construed to include automobiles,³⁵ or "self-

²⁷ *Erbaugh v U.S.*, 173 Fed. 433, 97 C.C.A. 663; *Alexander v Crosby*, 143 Iowa 50, 119 N.W. 717; *Hatton v State*, 92 Miss. 651, 46 So. 708; *Nance v Southern R. Co.*, 149 N.C. 366, 63 S.E. 116; *Ex parte Brown*, 21 S.D. 515, 114 N.W. 303; and see *State v Bartley*, 304 Mo. 58, 263 S.W. 95; *Hall v. State*, 20 Ohio 7. One cannot by implication be made subject to a criminal statute. *State v Lloyd*, 320 Mo. 236, 7 S.W. (2) 344.

²⁸ *Young v State*, 58 Ala. 358; *Groff v State*, 171 Ind. 547, 85 N.E. 769; *State v Wallace*, 102 Me. 229, 66 Atl. 476; *People v Weinstock*, 193 N.Y. 481, 86 N.E. 547; *State v Columbian Nat. Life Ins. Co.*, 141 Wis. 557, 124 N.W. 502. Nor will such statutes be read so as to create crimes or new degrees or classes thereof, unless clearly required by the language. *Colson v Aderhold*, 73 Fed. (2) 191.

²⁹ *Western Union Tel. Co. v Axtell*, 69 Ind. 199.

³⁰ *State v Hanchette*, 88 Kan. 864, 129 Pac. 1184; *State v Reed (La.)* 177 So. 252; *City of Anderson v Fant*, 96 S.C. 5, 79 S.E. 641; *Faulkner v Town of South Boston*, 141 Va. 517, 127 S.E. 380; *State v Hoffman*, 110 Wash. 82, 188 Pac. 25; *Brown v State*, 137 Wis. 543, 119 N.W. 338.

³¹ *Braffith v People of Virgin Island*, 26 Fed. (2) 646, *Atlantic Coast Line R. Co. v State*, 73 Fla. 609, 74 So. 595; *State v Andrews*, 167 Iowa 273, 149 N.W. 245; *State ex rel. Spriggs v Robinson*, 253 Mo. 271, 161 S.W. 1169; *Ex parte Smith*, 33 Nev. 466, 111 Pac. 939; *Houser v State*, 17 Ohio N.P.N.S 153; *Common. v Shields*, 50 Pa. Super. 194; *State v Hoffman*, 110 Wash. 82, 188 Pac. 25; *Haines v Territory*, 3 Wyo. 167, 13 Pac. 8.

³² But see *State v Small*, 29 Minn. 216, 12 N.W. 703.

³³ *Chase v Curtis*, 113 U.S. 452, 5 S.Ct. 554, 28 L.Ed. 1038; *People v Mooney*, 87 Colo. 567, 290 Pac. 271; *Ex parte Amos*, 93 Fla. 5; *Rohlf v Kasemeier*, 140 Iowa 182, 118 N.W. 276; *People v Lockhart*, 242 Mich. 491, 219 N.W. 724; *State v Dailey*, 76 Neb. 770, 107 N.W. 1094; *State v Heath*, 199 N.C. 135, 153 S.E. 855; *State v Fargo Bottling Works Co.*, 19 N.D. 396, 124 N.W. 387; *Buzzard v Common.*, 134 Va. 641, 114 S.E. 664; *Huntworth v Tanner*, 87 Wash. 670, 152 Pac. 523; *Weirich v State*, 140 Wis. 98, 121 N.W. 652. Such laws are to be construed strictly against an offender and liberally in his favor. *State v Tower*, 185 Mo. 79, 84 S.W. 10; *Weirich v State*, 140 Wis. 98, 121 N.W. 652.

³⁴ *People v Ryan*, 274 N.Y. 149, 8 N.E. (2) 313.

³⁵ *Common. v Goldman*, 205 Mass. 400, 91 N.E. 392. *Contra: Baker v Fall River*, 187 Mass. 53, 72 N.E. 336.

propelled vehicle'' to include aircraft.³⁶ Nor can the court, as a general rule, supply or correct any omission of the legislature regardless of what may be its cause.³⁷ And it matters not that the court believes that the statute should have been more comprehensive,³⁸ or that a strict construction produces an undesirable result.³⁹

Since the power to inflict punishment is vested in the legislature rather than in the courts, there is considerable danger in subjecting criminal or penal statutes to a liberal construction, lest the court invade the province of the legislature.⁴⁰ Moreover, the creation of an offense by interpretation may operate to entrap the unwary and ignorant and threaten the rights of the people generally.⁴¹ As is

³⁶ *McBoyle v U.S.*, 51 S.Ct. 340.

³⁷ *Schilling v State*, 116 Ind. 200, 18 N.E. 682; *State v Finch*, 37 Minn. 433, 34 N.W. 905. In this connection also see § 169, and §§ 200 and 201, *supra*.

³⁸ *U.S. v Weitzel*, 246 U.S. 533, 62 L.Ed. 872, 38 S.Ct. 381.

³⁹ *Grace v State*, 40 Ark. 97; *Ex parte Twing*, 188 Calif. 261, 204 Pac. 1082; *Bunfill v People*, 154 Ill. 640, 39 N.E. 565; *Hanks v Brown*, 79 Iowa 560, 44 N.W. 811; *Kuhn v Kuhn*, 125 Iowa 449, 101 N.W. 151; *West v State*, 27 Okla. Cr. 125, 225 Pac. 556. But see *State v Sutton*, 53 Kan. 318, 36 Pac. 716; *Hightower v Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97. And note *U.S. v Batre*, 69 Fed. (2) 673 (C.C.A.-9th) (fraud on revenue); *New York Cent. R.R. v U.S.*, 265 U.S. 41 (safety appliance act); *Atchison, T. & S. F. R. Co. v U.S.*, 244 U.S. 336 (hours of service); *People v Tallmadge*, 328 Ill. 210, 159 N.E. 319 (receiving deposits by bank during insolvency); *People v Abraham*, 44 N.Y.S. 1077 (statute made for good of public). In this connection, also see *State v Christup (Mo.)* 85 S.W. (2) 1024, where an escaped convict did not fall within the scope of the habitual criminal act which provided that it should apply when the defendant "shall be discharged, either upon pardon or upon compliance with his sentence".

⁴⁰ *U.S. v Wiltberger (U.S.)* 5 Wheat. 76, 5 L.Ed. 37; *Walton v State*, 62 Ala. 197; *State v Lowry*, 166 Ind. 372, 77 N.E. 728; *State v Woodruff*, 68 N.J.L. 89, 52 Atl. 294.

⁴¹ *Walton v State*, 62 Ala. 197; *Common. v Cooke*, 50 Pa. 201. Also see *McBoyle v U.S. (U.S.)* 51 S.Ct. 340.

obvious, the rule of strict construction largely and properly grows out of the tenderness of the law for the rights of the individual.⁴²

But it should always be remembered that the rule of strict construction does not require such a narrow, restrictive, verbal or unreasonably technical construction as will defeat the clear intention of the legislature.⁴³ Similarly, unless unavoidable, a strict construction should not be used so as to render a statute ineffective,⁴⁴ or to lead to absurd results,⁴⁵ or to defeat the obvious intention of the legislature.⁴⁶ Nor should a penal statute be construed so strictly as to work a public mischief, unless required by words of explicit and unequivocal import.⁴⁷

As thus appears, the rule of strict construction does not negative the use of other rules of construction in order to ascertain the legis-

⁴² U.S. v Wiltberger (U.S.) 5 Wheat. 76, 5 L.Ed. 37; State v Lowry, 166 Ind. 372, 77 N.E. 728; Jennings v Common., 109 Va. 821, 63 S.E. 1080.

⁴³ U.S. v Raynor, 302 U.S. 540, 58 S.Ct. 353, 82 L.Ed. Trammell v Victor Mfg. Co., 102 S.Ct. 483, 86 S.E. 1057. Also see U.S. v Corbett, 215 U.S. 233, 54 L.Ed. 173, 30 S.Ct. 81; Moore v Western Union Tel. Co., 164 Mo. Ap. 165, 148 S.W. 157; Widmer v State, 109 Ohio St. 236, 142 N.E. 145; Weirich v State, 140 Wis. 98, 121 N.W. 652. And see U.S. v Wiltberger (U.S.) 5 Wheat. 76, 5 L.Ed. 37: ". . . Though penal laws are to be construed strictly they are not to be construed so strictly as to defeat the obvious intention of the legislature." In accord with this view, a trailer attached to a tractor was held to be a 'motor vehicle' within a statute prohibiting the operation of such vehicles of excessive weight on the highways. State v Schwartzmann Service Co. (Mo.) 40 S.W. (2) 479.

⁴⁴ U.S. v Dillon, 168 Fed. 813, 94 C.C.A. 337; Garrison v Southern Ry. Co., 150 N.C. 575, 64 S.E. 578; Conrad v State, 75 Ohio St. 52, 78 N.E. 957; State v Larson, 119 Wash. 123, 204 Pac. 1041.

⁴⁵ U.S. v Katz, 271 U.S. 354, 70 L.Ed. 986, 46 S.Ct. 513. "And there can be no rule which requires courts so to understand a penal law, as to involve an absurdity, or frustrate the evident design of the law-giver." State v Fargo, 118 Conn. 267, 171 Atl. 661, 662.

⁴⁶ Johnson v Southern Pac. Co., 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363. Also note § 43, supra. "Courts do not approach the construction of a penal statute . . . with the hostile purpose of crippling a legislative intent plainly expressed." State v Fargo, 118 Conn. 267, 171 Atl. 660.

⁴⁷ State v Small, 29 Minn. 216, 12 N.W. 703.

lative purpose.⁴⁸ The ascertainment of the legislative intent is, even where penal statute are concerned, the sole legitimate purpose of judicial construction, and the rule of strict construction is to be utilized, along with the various other rules of construction, simply as a means for discerning and making the legislative intent effective.

Accordingly, in *United States v Raynor* (302 U. S. 540, 58 S.Ct. 353, 83 L.Ed. 413), where the federal counterfeiting law was involved, we find this enlightening statement of the legal principle with which we are now concerned:

“We are not unmindful of the salutary rule which requires strict construction of penal statutes. No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope. Nor does any rule require that the act be given the ‘narrowest meaning’. It is sufficient if the words are given their

⁴⁸ “While we disclaim the right to extend a criminal statute to cases out of its letter, yet we hold it to be our duty to apply it to every case clearly within the cause or mischief of making it, when its words are broad enough to embrace such case.” *Walton v State*, 62 Ala. 197. Also see *Meadowcroft v People*, 163 Ill. 56, 45 N.E. 991; *Hanley v Western Union Teleg. Co.*, 115 Ind. 191, 15 N.E. 845; *In re Ebbs*, 150 N.C. 44, 63 S.E. 190. And see *Johnson v Southern Pac.*, 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363: “I agree to that rule (of strict construction) in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner, the apparent legislative policy and objects of the legislature.” In short, the rules of construction applicable in civil statutes also apply to penal statutes. *People v Breyer*, 139 Calif. Ap. 547, 34 Pac. (2) 1065. Penal statutes should use language which clearly shows what is forbidden, and the courts may not give to such words a meaning different from that in which they are understood by ordinary citizens. *People v Stoll*, 242 N.Y. 453, 152 N.E. 259; also see *People v Lovelace*, 97 Calif. Ap. 228, 275 Pac. 489. Moreover, the rule of strict construction cannot be applied, unless the statute is ambiguous or of doubtful import. *Walsh v State (Dela.)* 136 Atl. 160, aff. 139 Atl. 257.

fair meaning in accord with the evident intent of Congress. Certainly, if Congress had intended to prohibit only the possession of 'distinctive paper', it would have simply used the words 'distinctive paper' instead of the distinguishing words 'similar paper adapted to the making of any such obligation'."

A similar view was taken by the court in *State v Dorau* (124 Conn. 160, 198 Atl. 573) where the theatre practice of "bank night" was held to be within the scope of the penal statutes against gambling:

"Of course, this being a criminal prosecution, we cannot sustain the conviction of the defendant unless his acts are within the prohibition of one of our criminal laws, but in determining that question, we are not obliged to give to a statute a narrow technical meaning contrary to a legislative intent falling 'within its spirit and (its) fair import'."

Not only does this rule cover the definition of the crime but also the penalty provided:

"In other words, if the statute contains such an ambiguity as to leave a *reasonable* doubt of its meaning, it is the duty of the court not to inflict the penalty, and in a case of *substantial* doubt as to what the legislature really meant, that construction should be adopted which is the least severe or which best protects the rights of the person accused or sought to be charged." *People v De Renna*, 2 N. Y. S. (2) 694, 166 Misc. 582.

Yet, the rule of strict construction has been held inapplicable where the defendant contends, not that the offense of which he is charged is not covered by statute, but by two code sections. This case—*Crabb v Zerst* (99 Fed. (2) 562)—may be well criticized if it be interpreted as a refusal on the part of the court to apply the one of two conflicting sections which most favors the defendant, although, of course, if the government has the right to elect one of two different statutes under which to charge the defendant, the rule obviously is inapplicable in determining which shall be utilized by the government. If the offense is merely defined in two or more sections, as seems the situation in the above case, obviously such sections must be construed together. Only after being thus construed, can the court determine whether any ambiguity exists. If the statute is found to be ambiguous, then the rule of strict construction may properly be applied.

As may be gathered from what we have already stated, statutes which provide a penalty either recoverable by the state or by the injured party in a civil action therefor, are usually considered penal

acts so far as the rule of strict construction is concerned. Therefore, the same rules which are applied to criminal statutes are also to be applied to statutes of this type. Nevertheless, there seems to be a tendency, with reference to such statutes, at least this is indicated by a number of cases, that the penal provisions are of only secondary importance, so that that nature is not a sufficient reason for subjecting the statute to a strict construction. Besides, statutes of this type are usually remedial and are primarily concerned with promoting the public welfare by establishing requirements for the public safety, health and tranquility. By virtue of this, they might be subjected to a liberal construction, although the penal features, particularly if they are invoked, might well be regarded as sufficient to restrain such liberality to a large degree.

§ 241. Statutory Provisions for Construction of Penal Acts.—

A penal or criminal statute may by virtue of its own provisions be excluded from being subject to strict construction.⁴⁹ Moreover, in a number of states,⁵⁰ the rule of strict construction of penal statutes has been expressly abrogated by provisions in the penal code.⁵¹ Where this is the case, the common law rule is destroyed and penal statutes are required to be liberally construed according "to the fair import of their terms, with the view of promoting justice and effecting the purpose of the enactment".⁵² Another type of statute, without specifically abrogating the old rule, enacts practically the

⁴⁹ *State v Hemrick*, 93 Wash. 439, 161 Pac. 79.

⁵⁰ See Hall, L.—Strict or Liberal Construction of Penal Codes (1934)

48 Harv. L.Rev. 748, 752, for history of the growth of statutory rules of interpretation of penal statutes, as well as for a list of the states with such statutes.

⁵¹ In *re Mitchell*, 1 Calif. Ap. 396, 82 Pac. 347; *Peterson v Currier*, 62 Ill. Ap. 163; *Common. v Trent*, 117 Ky. 34, 77 S.W. 390; *People v Teal*, 196 N.Y. 372, 89 N.E. 1086; *State v Fargo Bottling Works Co.*, 19 N.D. 396, 124 N.W. 387; *Morris v Territory*, 1 Okla. Cr. 617, 99 Pac. 760; *State v Dunn*, 53 Ore. 304, 99 Pac. 278, 100 Pac. 258; and see *Williams v Territory (Ariz.)* 108 Pac. 243, and *Thomas v State*, 40 Okla. Cr. 204, 267 Pac. 1040.

⁵² *Bush v State*, 19 Ariz. 195, 168 Pac. 508; *People v Sota*, 49 Calif. 67; *Common. v Trent*, 117 Ky. 34, 77 S.W. 390; *State v Fargo Bottling Works Co.*, 19 N.D. 396, 124 N.W. 387; *Hunter v State*, 10 Okla. Crim. 119, 134 Pac. 1134; *State v Dunn*, 53 Ore. 304, 99 Pac. 278, 100 Pac. 258; *Murray v State*, 21 Tex. Ap. 620, 2 S.W. 757. Also see *People v Weinstock*, 193 N.Y. 481, 86 N.E. 547. At least, nine states have this provision: Oregon, Arizona, California, Minnesota, Montana, New York, North Dakota, South Dakota and Utah.

same rule of liberal interpretation.⁵³ And in some states, the distinction between the construction of civil and penal statutes is abolished with a caveat that "all statutes are to be construed with a view to carry out the intention of the legislature".⁵⁴ But even in these jurisdictions, the court cannot enlarge a penal statute by implication, intendment,⁵⁵ or by a strained and forced construction,⁵⁶ so as to include persons and offenses not clearly included,⁵⁷ or to exclude persons or offenses not clearly excluded.⁵⁸ Indeed, any other result, would vest the power of punishment in the judiciary rather than in the legislature.⁵⁹ And in addition to provisions in the criminal code, or penal statute itself, the rule of strict construction may be abrogated by a general statute requiring all statutes to be construed liberally.⁶⁰

⁵³ See in this connection, Arkansas, Colorado, Illinois, Idaho and Iowa.

⁵⁴ See Texas, Kentucky and Nebraska.

⁵⁵ *Burks v Bosso*, 180 N.Y. 341, 73 N.W. 58; *City of Shawnee v Landon* (Okla.) 106 Pac. 652; *Ratcliff v State*, 106 Tex. Cr. 37, 289 S.W. 1072.

⁵⁶ *City of Rochester v Rochester Gas & Elec. Corp.*, 233 N.Y. 39, 134 N.E. 828. Also see *West v State*, 27 Okla. Cr. 125, 225 Pac. 556.

⁵⁷ *Ex parte Twing*, 188 Calif. 261, 204 Pac. 1082; *People v Fleishman*, 232 N.Y.S. 187, 133 Misc. 288; *Geneseo First Nat. Bank v National Live Stock Bank*, 13 Okla. 719, 76 Pac. 130; *Horner v State*, 1 Ore. 267; *State v Fargo Bottling Works Co.*, 19 N.D. 396, 124 N.W. 387; *People v Fleishman*, 232 N.Y.S. 187, 133 Misc. 288.

⁵⁸ *State v Fargo Bottling Works Co.*, 19 N.D. 396, 124 N.W. 387. Also see *People v Moore*, 127 N.Y.S. 98, 142 Ap. Div. 402, aff. 201 N.Y. 570, 95 N.E. 1136; *Common. v Woodward*, 110 Pa. Super. 473, 168 Atl. 347.

⁵⁹ *U.S. v Wiltberger* (U.S.) 5 Wheat. 76, 5 L.Ed. 37. And see *State v Mems*, 126 Minn. 191, 2 N.W. 492, that the rule of strict construction is necessary in order to guard against the creation of criminal offenses by judicial construction not intended by the legislature. Also note *Lane v State*, 120 Neb. 302, 232 N.W. 96; *Caldwell v State*, 115 Ohio St. 458, 154 N.E. 792; *State v A. H. Read Co.*, 33 Wyo. 387, 240 Pac. 208. But for arguments supporting a more liberal interpretation, see Hall, L., *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L.Rev. 748, 756 (1934).

⁶⁰ See *Richmond v Moore*, 107 Ill. 429. And the language in *State v Grinde*, 96 Mont. 608, 32 Pac. (2) 15, 17, is particularly interesting: "It is argued by appellants that, since this is a penal statute, it must be strictly construed. To this we cannot assent. Section 10710, Revised Codes 1921 provides: The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice. Our duty is but to ascertain the intention of the legislature. But this intention is to be ascertained from the terms of the statute, and we may not 'insert what has been omitted or omit what has been inserted'."

The language of the court in *People v Reilly* (6 N. Y. S. (2) 161) reveals what probably is the position to which statutes prescribing that penal acts shall be liberally construed, have been generally relegated by the courts:

“The Penal Law is not to be strictly construed. On the contrary, the provisions thereof should be interpreted according to the fair import of their terms, so that justice may be promoted and the objects of the law effected.

“The legislature has thus directed the courts not to use artificial reasoning in the interpretation of the penal law, but it is our duty to give its words their usually accepted meaning . . .”

It is doubtful, even in the face of statutes seeking to abrogate the rule of strict construction, whether the courts have, or for that matter should, subject them to any different construction than they would without the statutory announcement. If the legislative intent is the object of interpretation, it should be ascertained and made effective, even though a strict construction is necessary. Since penal or criminal acts generally affect the rights and liberties which men consider the most precious, it does not seem unreasonable to assume that the law-makers, when enacting laws affecting these rights and liberties, intended that they be no more restrictive or severe than is clearly necessary. The law-makers must realize that there are certain rights beyond the control of the state, and others which are subject only to a limited amount of control or regulation. Conscientious legislators are surely solicitous of the rights and liberties of their constituents, and realizing the value of these essentials of human happiness and achievement, must surely intend to impair them no farther than is absolutely necessary. More than this, it is much more probable that a specific penal law is enacted with a specific intent than it is in the light of the general statutory requirement that penal acts shall not be subjected to a strict construction.

§ 242. The Rule of Strict Construction of Penal Statutes Criticized.—While it would appear that more could be said in favor of the strict construction of penal statutes than could be said against the rule, nevertheless the rule of strict construction has been subjected to considerable criticism. Perhaps no case assaults the rule more effectively than *State v Fargo* (118 Conn. 267, 171 Atl. 660):

“The principle that a penal statute should receive a strict construction and that no act should be held within it which

does not fall within its spirit and the fair import of its language . . . had its origin in England at a time when English law was exceedingly harsh in its penalties and sweeping in its condemnations. There is not now the same necessity for adherence to technical niceties or artificial distinctions in aid of persons accused of crime as there was then. . . . The criminal code of this state is clear in its definitions of crimes, mild in its punishments, and careful in its provisions for securing full and impartial trials. It is a false humanity which would protect offenders, either by stifling detection and prosecution, or by affording facilities to escape conviction, by unnecessary and artificial technicalities in the administration of the law. The purpose of the rule of strict construction is not to enable a person to avoid the clear import of a law through some mere technicality, but to enable the people of the state to know clearly and precisely what acts the legislature has forbidden under a penalty, that they may govern their conduct accordingly, and to make sure that no act which the legislature did not intend to include will be held by the courts within the penalty of the law. To enforce the rule beyond its purpose would be to exalt technicalities above substance."

But this case does not wholly reject the rule of strict construction. It would seem simply to limit its application or to lessen the degree of strictness. And the rule thus laid down has considerable merit, provided it stands upon sound premises—that the criminal code is clear in its definitions, mild in its punishments, and careful in its provisions for securing impartial trials, for it must be admitted that adherence to the rule of strict construction does often tend toward the creation of a technical system of criminal jurisprudence. This tendency undoubtedly was a leading factor in causing the various states to enact statutes expressly abrogating the rule of strict construction.

The intent of the legislature, however, is just as likely to be defeated in those jurisdictions which have abrogated the rule of strict construction and substituted in its place a rule of liberal construction, as it is in those states which still adhere to the common law rule by virtue of which penal statutes are to be construed strictly. Just as in the latter instance there is a tendency toward technicality, where the rule of liberal construction is applied, there is danger that criminal statutes will become dangerously flexible or so inclusive as to set hidden pitfalls for the unwary. There is danger that the courts may go from one extreme to the other. Instead of abrogating the rule of strict construction and setting up in its place

the opposite rule, it is suggested that the law-makers might well content themselves with simply declaring that criminal statutes are to be construed so as to carry out rather than to defeat the legislative intent, which, after all, is the true purpose of all construction. And should one be forced to make a choice between a technical construction and an all-inclusive one, the former is certainly to be preferred. Even though some of the reasons which led to the development of the rule of strict construction no longer exist, certain of them are still with us. Life, liberty and property are still the prime objects of the law's concern. As the court said in *United States v Wiltberger* (5 Wheat. 76, 5 L. Ed. 37) :

“The rule that penal laws are to be construed strictly, is perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.”

Nor is a liberal construction justified simply in order to promote the practical administration of criminal justice—an argument clearly rejected in *People v Tompkins* (186 N. Y. 413, 79 N. E. 326, 12 L. R. A. (N. S.) 1081) :

“We are also impressed with the weight of the argument that in view of the constantly expanding ingenuity of intelligent criminals, which serves to render the administration of criminal justice more and more difficult, the law must be progressively practical in order to keep pace with the development of new forms of crime. But these arguments, impressive as they are, simply serve to suggest that it is the province of courts to give effect to existing rules of law and not to legislate.”

More than that, as was asserted by Justice Brandeis, in a dissenting opinion in *Olmstead v United States* (277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376) :

“... it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are

beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

From the foregoing, as well as from an analysis of other decisions, even though one favors the liberal construction of penal statutes generally, it would not seem desirable to subject all penal acts to a liberal construction. Certain criminal statutes should be strictly construed. For instance, where there is considerable doubt concerning the statute's definition of the crime, justice would demand that the statute be construed to give "fair warning" of the conduct considered criminal. This idea was expressed by the court in *McBoyle v United States* (283 U. S. 25, 51 S. Ct. 340, 75 L. Ed. 618):

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Moreover, no real objection can be raised to submitting to a strict construction those penal statutes which impose exceedingly harsh penalties. Habitual criminal statutes would fall within this category, as would statutes which impose the death penalty. From this standpoint, it would be more proper to subject statutes creating misdemeanors to a liberal construction than it would be to subject statutes defining felonies to such a construction. And regardless of the type of the statute, the more disproportionate the punishment with the unlawful act, the more deserving is the statute of a liberal construction in favor of the accused. Furthermore, statutes which deal with conduct which men generally regard as illegal, such as murder, theft and forgery, may more properly be subjected to a liberal construction than statutes which are concerned with conduct not necessarily contrary to the general moral standards of mankind. And where a statute of this latter type is involved and the accused has made an honest effort to meet the requirements of the law, the statute should surely be subjected to a strict construction.

In connection with the thought that certain types of criminal statutes should be given a strict construction, an examination of the authorities reveals the existence of a number of decisions point-

ing in this direction. For example, we find the following language in *People v Shakum* (251 N. Y. 107, 167 N. E. 187):

“The citizen is entitled to an unequivocal warning before conduct on his part, which is not *malum in se*, can be made the occasion of a deprivation of his liberty or property.”

The same attitude is taken by the court in *United States v Limehouse* (58 Fed. (2) 395):

“Moreover, I think that in a criminal case of this sort, of a highly penal nature, a citizen should not be compelled to resort to proceedings in Congress to determine whether a course of action on his part is or is not prohibited by law, when the statute is fairly clear on its face.”

And in *De Navigation v Elting* (19 Fed. (2) 773), a similar idea is expressed when the court approved the following language of an earlier decision:

“The purpose is not to be imputed, in the absence of plain language, to penalize an act innocent of intentional wrong. It would be unnecessary, and it seems to me an unwarranted construction to read the statute as intended to subject the vessel owner to a penalty for bringing into port an alien who has stolen his passage, and whose presence on the vessel may not have been discovered before her arrival. Such a person is not ‘imported’ within the ordinary meaning of penal laws.”

Often statements are made that the liberal construction of penal laws operates to the advantage of the criminal. Of course, that is true because that is the purpose of the rule of liberal construction. Nevertheless, the adoption of the contrary view, would be equally objectionable, as it would generally operate to the advantage of the state. After all, the logic behind the rule of strict construction of criminal statutes has never really been overthrown, and the maxim still stands that it is better that some who are guilty may escape than that an innocent man may be punished. And from a practical standpoint, it is very doubtful whether the rule of liberal construction in favor of the accused, actually gives the accused much advantage when the power and the prestige of the government is placed into the scales. Actually, at least so far as the trial is concerned, this power and prestige constitute a serious handicap to the defendant, in the usual run of criminal prosecutions.

In many instances, however, there may be no real objection to putting a strict construction on the penal provisions of a criminal statute and a liberal construction on its remedial features, as was

done in *Verona v Schenley Farms Co.* (312 Pa. 57, 167 Atl. 317). Similarly, it is possible that a liberal construction might be had of those provisions which simply prescribe the punishment in contrast with those which describe the crime. But in subjecting the different provisions of a penal statute to various degrees of construction, it is possible that the problem of construction may often be amplified. It may not always be possible to determine the real nature of the various provisions of the statute. And in some cases, the various provisions may partake of the nature of other provisions so that a distinction would at best be but artificial. In some instances, such as where the habitual criminal act is concerned, the part providing the punishment may be the vital part of the statute and consequently deserving of a strict construction.

Susceptible as the rule of strict construction is to criticism, the dangers attendant to the application of the opposite type of construction, are far more serious. The realization of this fact has surely been responsible for a marked tendency, even in those states which have sought to abrogate the common law rule, toward retaining the basic elements of the old rule.

Perhaps after all *United States v Wiltberger*, from which we have already quoted, announces the best view:

“It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so.”

Another excellent statement of what would seem the proper judicial attitude appears in *State v Sowards* (— Okla. —, 82 Pac. (2) 324),

where a district maintenance superintendent was held to be a public official and not a mere employee of the state:

“It is a well settled rule that a penal statute must be construed with such strictness as to carefully guard the rights of the accused and at the same time preserve the obvious intention of the legislature.”

And where the statute is not primarily a criminal one but one which provides for the infliction of a penalty either in favor of the state or of the injured party, in order to promote the public welfare by adding the penalty as an additional incentive toward obedience of the mandates of the law, perhaps the judicial attitude of the court, as revealed in *Johnson v Southern Pacific Co.* (196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363), will furnish a practical type of construction to be used in lieu of strict construction:

“The intention of Congress, declared in the preamble and in sections one and two of the act, was ‘to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes’, those brakes to be accompanied with ‘appliances for operating the train-brake system’; and every car to be ‘equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars’, whereby the danger and risk consequent on the existing system was averted as far as possible. . . .

The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction (cases cited).

Moreover, it is settled that ‘though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature.’ *United States v Lacher*, 134 U. S. 624, 10 S. Ct. 625, 33 L. Ed. 1080. In that case we

cited and quoted from *United States v Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, in which Mr. Justice Story, referring to the rule that penal statutes are to be construed strictly, said:

'I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner, the apparent policy and objects of the legislature.'

Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words 'coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars', and cannot be sustained."

§ 243. Statutes Part Penal and Part Remedial.—There are, as already indicated, many statutes which are both penal and remedial,⁶¹ with the penal and remedial provisions so interlocked that a separation may be impossible.⁶² Some courts are inclined to emphasize the penal features of statutes of this type, and thus sub-

⁶¹ *Robinson v Harmon*, 157 Mich. 276, 122 N.W. 106; *State v Dunn*, 53 Ore. 304, 99 Pac. 278, 100 Pac. 258; *State v Pullen (R.I.)* 192 Atl. 473. For additional treatment, see § 253, *infra*.

⁶² *Abbott v Wood*, 22 Me. 541. Also see *Avers v Phillips Petro. Co.*, 25 Fed. Supp. 458, that a statute which creates a new crime or evidences a new regulative excursion into the field of business by the government, must be so plain as to notify the ordinary citizen of such move.

ject them to the rule of strict construction.⁶³ Other courts construe the statute as a penal statute when its penal provisions are sought to be invoked and as a remedial statute when its remedial features are invoked.⁶⁴ It is suggested that this latter law is probably preferable, if the rule of strict construction is to be qualified.

§244. Statutes in Derogation of Sovereignty.⁶⁵—Statutes in derogation of sovereignty are strictly construed in favor of the state.⁶⁶ Consequently, statutes authorizing suits against the state,⁶⁷

⁶³ *Abbott v Wood*, 22 Me. 541; *Hathaway v Johnson*, 55 N.Y. 93.

⁶⁴ *Credit Men's Adjustment Co. v Vickery*, 62 Colo. 214, 161 Pac. 297; *Bell v Farwell*, 176 Ill. 489, 52 N.E. 346; *Robinson v Harmon*, 157 Mich. 276, 122 N.W. 106; *Grier v Kansas City, etc., R. Co.*, 286 Mo. 523, 228 S.W. 454, reh. overruled, 254 S.W. 359, aff. 258 U.S. 610, 66 L.Ed. 789, 42 S.Ct. 382; *Stull v Reber*, 215 Pa. 156, 64 Atl. 419; *Gardner v New York, etc., R. Co.*, 17 R.I. 790, 24 Atl. 831; *Trammell v Victor Mfg. Co.*, 102 S.C. 483, 86 S.E. 1057; *Adams v Hubbard*, 67 Vt. 76, 30 Atl. 687. Thus, in a statute which provided that all real estate salesmen should secure a license and fixed a penalty for acting without one, the court said that "there is no impropriety in putting a literal construction on a penal clause, and a liberal construction on a remedial clause in the same statute. *Verona v Schenley Farms Co.*, 312 Pa. 57, 167 Atl. 317. Also note *Johnson v Southern Pac. Co.*, 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363.

⁶⁵ Also see § 245, *infra*.

⁶⁶ *Dollar Savings Bank v U.S.*, 19 Wall (U.S.) 227, 22 L.Ed. 80; *State v Love*, 99 Fla. 333, 126 So. 374; *Winfield v Public Service Comm.*, 187 Ind. 53, 118 N.E. 531; *In re Searsport Water Co.*, 118 Me. 382, 108 Atl. 452; *Potter v Fidelity, etc., Co.*, 101 Miss. 823, 58 So. 713; *Smith v State*, 227 N.Y. 405, 125 N.E. 841; *Sullivan v Tomah School Dist.*, 179 Wis. 502, 191 N.W. 1020. Exemptions from taxation are regarded in derogation of sovereign authority. *Jones v Williams*, 121 Tex. 94, 45 S.W. (2) 130.

⁶⁷ *Raymond v State*, 54 Miss. 562; *Miller v State*, 247 N.Y.S. 399, 231 Ap. Div. 363; *Rose v Governor*, 24 Tex. 496. But contra: *Reynolds v U.S.* (D.C.—Okla.) 18 Fed. Sup. 739; *State v Curran*, 12 Ark. 321.

statutes granting exemption from taxation,⁶⁸ or statutes vesting sovereign powers in corporations,⁶⁹ will not divest the state of any of its sovereign power or prerogatives, unless the law-makers clearly reveal an intention to do so.⁷⁰

§ 245. Legislative Grants.—Legislative grants—whether they be of property,⁷¹ rights⁷² or privileges,⁷³ or to municipal⁷⁴ or private corporations,⁷⁵ or individuals⁷⁶—must be strictly construed

⁶⁸ Kentucky Cent. R. Co. v Bourbon County, 82 Ky. 497; Seamen's Friend Soc. v Mayor, 116 Mass. 181; Gorum v Mills, 34 N.J.L. 177; Lima v Lima Cemetery Ass'n, 42 Ohio St. 128; Academy of Fine Arts v Philadelphia County, 22 Pa. 496. But see Yazoo & M. V. R. Co. v Board of Levee Comrs., 37 Fed. 24; Philadelphia v Church of St. James, 134 Pa. 207, 19 Atl. 497, and Milwaukee & St. P. R. Co. v City of Milwaukee, 34 Wis. 271.

⁶⁹ Central Union Tel. Co. v Indianapolis Tel. Co., 189 Ind. 210, 126 N.E. 628; New Jersey Interstate Bridge, etc., Comm. v Jersey City, 93 N.J. Eq. 550, 118 Atl. 264. Also see In re McClure Co., 21 Fed. (2) 538.

⁷⁰ In re McClure, 21 Fed. (2) 538; New Jersey Interstate Bridge, etc., Comm. v Jersey City, 93 N.J. Eq. 550, 118 Atl. 264; Academy of Fine Arts v Philadelphia, 22 Pa. 496.

⁷¹ U.S. v Butte, etc., R. Co., 38 Fed. (2) 871; People v Kerber, 152 Calif. 731; Tampa, etc., R. Co. v Catts, 79 Fla. 235, 85 So. 364; Dolan v Walker, 121 Tex. 361, 49 S.W. (2) 695.

⁷² Des Moines v Iowa Telephone Co., 181 Iowa 1282, 162 N.W. 323.

⁷³ Stein v Mienville Water Supply Co., 141 U.S. 67, 35 L.Ed. 622, 11 S.Ct. 892; Franciscus Realty Co. v Commr. Int. Revenue, 39 Fed. (2) 583; Warner v Fowler, 8 Md. 25; People v Labbe, 202 Mich. 513, 168 N.W. 451; Peters v Sisson, 169 N.Y.S. 940, 102 Misc. 465; State v Biggs, 133 N.C. 729, 46 S.E. 401; Jones v Williams, 121 Tex. 94, 45 S.W. (2) 130 (exemption from tax).

⁷⁴ Richmond Trust Co. v Charlotte County, 300 Fed. 121, rev. 12 Fed. (2) 62; City of Alton v Aetna Ins. Co., 82 Ill. 45; Paine v Spratley, 5 Kan. 525; City of St. Louis v Laughlin, 49 Mo. 559.

⁷⁵ Hughes v Northern Pac. R. Co., 18 Fed. 585; Charles River Bridge v Warren Bridge, 11 Pet. (U.S.) 420, 9 L.Ed. 773; In re Russell, 163 Calif. 668, 126 Pac. 875; Walbridge v Robinson, 22 Idaho 236, 125 Pac. 812; Watson Seminary v Pike County, 149 Mo. 57, 50 S.W. 880, 45 L.R.A. 675; Raleigh & G. R. Co. v Reid, 64 N.C. 155; Wilkes County v Call, 123 N.C. 308, 31 S.E. 481, 44 L.R.A. 252. The construction is against the grant of corporate existence. Central R., etc., Co. v Georgia, 92 U.S. 665, 23 L.Ed. 757.

⁷⁶ Board of Comrs. of Shawnee County v Carter, 2 Kan. 115 (as officers): State v Morehead. 100 Neb. 864. 161 N.W. 569 (as an officer). But

against the grantee and in favor of the grantor—the government or the public.⁷⁷ Where there is any doubt, it must be resolved in favor of the public.⁷⁸ Nothing, therefore, will pass by virtue of the grant except what is given in clear and explicit terms.⁷⁹

This rule relating to the strict construction of legislative grants is based on the assumption that the grant was made at the solicitation of the grantee and was drafted by him, and that therefore its

note as to pensions, bounties, or rewards, and even official salaries, that the grant should be construed in furtherance of the statute's object and most beneficially in favor of the beneficiaries. *Johanson v Washington*, 190 U.S. 179, 23 S.Ct. 825, 47 L.Ed. 1008 (educational purposes); *Walton v Cotton*, 19 How (U.S.) 355, 15 L.Ed. 658 (pensions); *Butler v (U.S.)* 23 Ct. Cl. 162 (public officer's compensation); *Logue v Fenning*, 29 Ap. D.C. 519 (bounty); *Blanchard v Sprague*, Fed. Cas. No. 1,517 (patent right); *U.S. v Morse*, 3 Story (U.S.) 87 (official salary). Also see *State v Buchanan County*, 41 Mo. 254 (court costs).

⁷⁷ *Central Transp. Co. v Pullman Palace Car Co.*, 139 U.S. 24, 11 S.Ct. 478, 35 L.Ed. 55; *U.S. v Michigan*, 190 U.S. 379, 23 S.Ct. 742, 47 L.Ed. 1103; *Citizens Pipe Line Co. v Twin City Pipe Line Co.*, 178 Ark. 309, 10 S.W. (2) 493; *Lovejoy v Norwalk*, 112 Conn. 199, 152 Atl. 210; *Chicago City R. Co. v Chicago*, 323 Ill. 246, 154 N.E. 112; *Jackson v Revere Sugar Ref. Co.*, 247 Mass. 483, 142 N.E. 909; *People v Labbe*, 202 Mich. 513, 168 N.W. 451; *People v State Tax Comrs.*, 174 N.Y. 417, 67 N.E. 69, 63 L.R.A. 884; *Emerson v Common.*, 108 Pa. 111. If the grant is to subserve the public interest by benefits to individuals, or if corporations are to undertake work of a quasi-public character, it is entitled to a more liberal construction than a strict private grant. *U.S. v Denver, etc., R. Co.*, 150 U.S. 1, 14 S.Ct. 11, 37 L.Ed. 975; *Brennan v Weatherford*, 53 Tex. 330; *Imperial Irr. Co. v Jayne*, 104 Tex. 395, 138 S.W. 575. For further treatment, see § 356, *infra*.

⁷⁸ *Hannibal & St. J. R. Co. v Missouri River Packet Co.*, 125 U.S. 260, 8 S.Ct. 874, 31 L.Ed. 731.

⁷⁹ *Coosaw Min. Co. v South Carolina ex rel Tillman*, 144 U.S. 550, 12 S.Ct. 689, 36 L.Ed. 537; *People v Kerber*, 152 Calif. 731, 93 Pac. 878; *Johns-Manville, Inc., v Lander County*, 48 Nev. 253, 240 Pac. 925; *Manning v Atlantic, etc., R. Co.*, 188 N.C. 648, 125 S.E. 555. Conversely, where the grant was made at the government's motion, or where it receives a valuable consideration therefor, the granting act should be liberally construed. *Hyman v Read*, 13 Calif. 445; *Butchers' Slaughtering & Melting Ass'n v City of Boston*, 214 Mass. 254, 101 N.E. 426; *Dermott v State*, 99 N.Y. 101, 1 N.E. 242; *People v Wainwright*, 237 N.Y. 407, 143 N.E. 236.

language is his language and should be construed against him.⁸⁰ Accordingly, it operates to protect the public's interests from attempts to secure property, privileges and rights through the use of ambiguous language.⁸¹ The application of the rule to legislative grants would, therefore, in most instances, seem undeniably sound, although it should never be used as an instrumentality to defeat the manifest intention of the legislature.⁸²

⁸⁰ *Coosaw Min. Co. v South Carolina ex rel Tillman*, 144 U.S. 550, 12 S.Ct. 689, 36 L.Ed. 537; *Cleveland Elev. R. Co. v Cleveland*, 204 U.S. 116, 51 L.Ed. 399, 27 S.Ct. 517. Also note *Blair v Chicago*, 201 U.S. 400, 26 S.Ct. 427, 50 L.Ed. 801; *State v Biggs*, 133 N.C. 729, 46 S.E. 401, 64 L.R.A. 139. But if the grant was not made at the solicitation of the grantee, the act should be construed liberally in favor of the grantee, and especially if the grant is in the nature of a contract imposing trouble and cost upon the grantee. *Hyman v Read*, 13 Calif. 445. Is not this rule based on the rule applicable to grants from the crown? *City of N.Y. v Interborough Rapid Transit Co.*, 109 N.Y.S. 885, 125 Ap. Div. 437. But note *Hyman v Read*, 13 Calif. 445, quoting from *Charles River Bridge v Warren Bridge*, 11 Pet. 420, 9 L.Ed. 773: "An attempt has, however, been made to put the case of legislative grants upon the same footing as royal grants, as to their construction, upon some supposed analogy. Such a claim in favor of republican prerogative is new, and no authority has been cited which supports it. Our legislatures neither have, nor affect to have, any royal prerogatives. There is no provision in the constitution authorizing their grants to be construed differently from the grants of private persons, in regard to the like subject matter. The policy of the common law, which gave to the crown so many exclusive privileges and extraordinary claims, different from those of the subject, was founded, in a good measure, if not altogether, upon the divine right of kings, or, at least, upon a sense of their exalted dignity and pre-eminence over all subjects, and upon the notion that they are entitled to peculiar favor for the protection of their kingly right and office. Parliamentary grants never enjoyed such privileges. They were always construed according to common sense and common reason, upon their language and their interest. What reason is there that our legislative acts should not receive a similar interpretation? Is it not at least as important in our free government that a citizen should have as much security for his rights and estate derived from the grants of the legislature, as he would have in England? What solid ground is there to say, that the words of a grant in the mouth of a citizen shall mean one thing and in the mouth of the legislature shall mean another thing?"

⁸¹ *Ibid.*

⁸² *Warth v Herman*, 129 N.Y.S. 730, 144 Ap. Div. 943; *Manning v Atlantic*, etc., R. Co., 188 N.C. 648, 125 S.E. 555. Also see *Caverow v Newark Mut. Ben. L. Ins. Co.*, 52 Pa. 554; *Utah Cooper Co. v Industrial Commission*, 57 Utah 118, 193 Pac. 24, 13 A.L.R. 1367. If the language is unambiguous and clear, it must be given effect. *In re Binghampton Bridge Co.*, 3 Wall. (U.S.) 51, 18 L.Ed. 137.

However, where the grant is made to a public service or municipal corporation, or to a public officer, or public body, the grant will also carry with it all other powers that are incidental or reasonably necessary to the exercise of those expressly granted.⁸³

While the general rule with reference to the construction of private grants is as above set forth, it is said that the opposite rule prevails in cases of grants by the king; for where there is any doubt, the construction is made most favorably for the king. But, it is a rule of very limited application. It applies only to those cases where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive and the other more restricted; so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. So, also, this rule of construction is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases and the grant is expounded exactly as it would be in the case of a private grant.⁸⁴

§ 246. Statutes in Derogation of Common Right.—Statutes of this type or those which impose special restrictions or burdens or confer special privileges upon certain individuals or groups of indi-

⁸³ *Detroit Citizens St. Ry. Co. v Detroit Ry.*, 171 U.S. 48, 18 S.Ct. 732, 43 L.Ed. 67; *Lovejoy v Norwalk*, 112 Conn. 199, 152 Atl. 210; *Bailey v Van Pelt*, 78 Fla. 337, 82 So. 789; *Euziere v Highway Comm.* (Ill.) 178 N.E. 397; *State v Zimmerman*, 86 Minn. 353, 90 N.W. 783, 58 L.R.A. 78. But see *Malone v Lancaster Gas. Co.*, 182 Pa. 309, 37 Atl. 932, in which those powers "reasonably convenient" in the exercise of those expressly granted, were implied. *Euziere v Highway Comm.*, 346 Ill. 131, 178 N.E. 397, however, reveals the application of the general rule. There a highway commissioner, a statutory officer, was involved, who could exercise only such powers as were conferred upon him by statute. "Yet," said the court, "a legislative grant carries with it by implication, the power necessary to make the grant effective. A quasi-public corporation has the implied power to make the contracts necessary to enable it to exercise the powers conferred and to perform the duties enjoined upon it by law." Consequently, the highway commissioner had *prima facie* the power to purchase materials for the purpose of repairing roads and bridges, although not expressly granted.

⁸⁴ *City of N.Y. v Interborough Rapid Transit Co.*, 109 N.Y.S. 885, 125 Ap. Div. 437. Also see *Fertilizer Co. v Hyde Park*, 97 U.S. 659, 24 L.Ed. 1036.

viduals separate and apart from the rest of the community.⁸⁵ Such statutes are to be strictly construed;⁸⁶ and as a result, they must not be extended beyond their literal meaning.⁸⁷ They can be applied only to cases clearly falling within the statutory provisions.⁸⁸

Statutes pertaining to the exercise of a trade or profession,⁸⁹ to eminent domain,⁹⁰ to the restraint of personal liberty,⁹¹ or freedom

⁸⁵ *Richardson v Ainsa*, 11 Ariz. 359, 95 Pac. 103; *Peet v City of East Grand Forks*, 101 Minn. 523, 112 N.W. 1005; *State v Grymes*, 65 W.Va. 451, 64 S.E. 728. Also see § 248, *infra*, Statutes in Derogation of the Common Law.

⁸⁶ *McDonnell v Murnan*, 210 Ala. 611, 98 So. 887; *Interstate Contracting, etc., Co. v Belleville Sav. Bank*, 197 Ill. Ap. 30; *Concrete Steel Co. v Metropolitan Casualty Ins. Co.* (Ind. Ap.) 173 N.E. 651; *Ketteringham v Eureka Homestead Soc.*, 140 La. 176, 72 So. 916; *Potter v Fidelity, etc., Co.*, 101 Miss. 823, 58 So. 713; *Stamford v Fisher*, 140 N.Y. 187, 35 N.E. 500; *Asbury v Albemarle*, 162 N.C. 247, 78 S.E. 146; *Morton v Wessinger*, 58 Ore. 80, 113 Pac. 7.

⁸⁷ *Pelham v The Messenger*, 16 La. Ann. 99. Also see *Rothgerber v Dupuy*, 64 Ind. 452; *Frazier v Leas*, 127 Md. 572, 96 Atl. 764.

⁸⁸ *Manners v State* (Ind.) 5 N.E. (2) 300.

⁸⁹ *Lockwood v District of Columbia*, 24 Ap. D.C. 569; *Brooks v State*, 88 Ala. 122, 6 So. 902; *Common. v Beck*, 187 Mass. 15, 72 N.E. 357; *People v Marx*, 99 N.Y. 377, 2 N.E. 29; *State v Biggs*, 133 N.C. 729, 46 S.E. 401, 64 L.R.A. 139; *State v Dauben*, 99 Ohio St. 406, 124 N.E. 232; *Rhodes v J. B. B. Coal Co.*, 79 W.Va. 71, 90 S.E. 796. ". . . statutes in derogation of individual rights are to be strictly construed; it will be presumed that a statute is not intended to interfere with or prejudice a private right or title . . . All statutes are to be construed as far as possible in favor of equality of rights and all restrictions on human liberty, and all claims for special privileges are to be regarded as having the presumption of law against them. Statutes which interfere with legitimate enterprise or limit the right to construct or operate legitimate industries are to be given a strict construction." As a result, a statute defining a legal newspaper as one published for five consecutive years in the same city did not extinguish publication rights acquired by a newspaper subsequently suspending publication for less than one year. *Lee v Burns*, 194 Ind. 676, 182 N.E. 277.

⁹⁰ *Gillett v Aurora Rys. Co.*, 228 Ill. 261, 81 N.E. 1005; *Bogart v Castor*, 87 Ind. 244; *Southern Ill. & M. Bridge Co. v Stone*, 174 Mo. 1, 73 S.W. 453, 63 L.R.A. 301; *Campbell v Youngson*, 80 Neb. 322, 114 N.W. 415; *In re Water Comrs.*, 96 N.Y. 351; *Chesapeake & O. R. Co. v Walker*, 100 Va. 69, 40 S.E. 633.

⁹¹ *Batten v McCarty*, 86 Ind. Ap. 462, 158 N.E. 583; *Common. v Beck*, 187 Mass. 15, 72 N.E. 357; *Matter of Smith*, 146 N.Y. 68, 40 N.E. 497 (isolation for disease).

of contract,⁹² and the like,⁹³ are statutes in derogation of common right and subject to strict construction.

§ 247. Reasons for Strict Construction of Statutes in Derogation of Common Right and Some Illustrative Cases.—The reasons for subjecting statutes in derogation of common or natural rights to a strict construction are obvious. In the first place,

“It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it is so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of the governments, are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted A. and B. who were husband and wife to each other should no longer be his, but that A. should thereafter be the husband of C. and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his but should thenceforth be the property of B.’”⁹⁴

⁹² *Tinker v Modern Brotherhood*, 13 Fed. (2) 130; *Lincoln National Life Ins. Co. v Hammer*, 41 Fed. (2) 12; *Lone Star Finance Co. v Universal Auto Ins. Co. (Tex. Civ. Ap.)* 28 S.W. (2) 573; *New York Life Ins. Co. v West*, 102 Colo. 591, 82 Pac. (2) 254.

⁹³ *People v Bartlett*, 169 Ill. Ap. 304 (civil rights); *Young v Madison*, 137 Iowa 515, 115 N.W. 23 (use of highway); *Aikins v Nevada Placer (Nev.)* 13 Pac. (2) 1103 (alienation of property); *Nance v Southern R. Co.*, 149 N.C. 366, 63 S.E. 116 (use of property).

⁹⁴ Per *Miller, J.*, in *Citizens' Savings & Loan Ass'n v Topeka (U.S.)* 20 Wall. 655, 662-663, 22 L.Ed. 455.

Consequently, any statute which tends to infringe upon these rights should be construed so as not to destroy or impair them. Under our theory and form of government, it must be presumed that the legislature does not intend to impair or destroy the great natural rights of men. It is, therefore, proper to assume that the legislature does not intend to abrogate them.

Of course, in a civilized government, so far as most natural rights are concerned, a certain amount of regulation is necessary. So, where statutes of such a regulatory nature are involved, a strict construction in favor of our natural rights, should be favored, for they should be regulated no further than the language clearly indicates. And where a statute properly limits the rights common to men generally—such rights as freedom of contract and freedom of speech—so that a particular individual's exercise of one of these rights may be restricted, a second reason for subjecting statutes in derogation of common right to a strict construction, may be found in the inequality which is apt to occur. While circumstances may properly demand the restriction of certain natural rights to certain persons, yet in order to maintain that equality so essential under any real system of jurisprudence, the courts should not resolve any doubt in favor of the restriction. So far as is possible, the restriction of natural rights should be retained in the narrowest limits, as that attitude alone is commensurate with the position of these rights under our philosophy of government. It must be presumed that our legislatures respect these rights and recognize that they are limitations upon the exercise of the law-making power. No statute should be construed so as to restrict or impair the natural and common rights of men, unless the language will lead to other conclusion. And besides, a statute may be so restrictive or destructive as to be invalid, so that a further reason exists for retaining statutes abrogating natural rights within the narrowest limits possible.

An examination of several cases will reveal more vividly the importance of subjecting statutes of this character to a strict construction. For instance, there is the case of *Fletcher v. Peck* (6 Cranch (U. S.) 87, 3 L. Ed. 162), where the legislature of the state of Georgia granted, by legislative act, certain lands to certain purchasers, who, in turn sold such land to third parties, after which, a subsequent legislature, on the ground that the grant had been obtained by fraud, passed an act annulling and rescinding the law under which the conveyance to the original grantees was made and

declaring that the title remained in the state. The court in holding that the title could not thus be taken from the innocent purchasers from the original grantees stated:

“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found; if the property of an individual, fairly and honestly acquired, may be seized without compensation?”

And in *New York Life Insurance Co. v West* (102 Colo. 591, 82 Pac. (2) 754), the statutory inhibition against an insurer defending on the ground of suicide was subjected to a strict construction because “the statute is a limitation of the general right of contract, and such statutes are strictly construed. In case of doubt, they are resolved in favor of the right.” Consequently, where an insurance policy excluded death due to poison, that defense was permissible, notwithstanding the existence of a statute which provided that “the suicide of a policy-holder of any life insurance company doing business in this state, shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policy-holder was sane or insane.” Similarly, in *Nance v Southern Railway Company* (149 N. C. 366, 63 S. E. 116), a railroad company was held without the scope of a statute which fixed a penalty for the refusal by certain users of scales to permit an official adjustment of such scales, even though the railroad’s scales were used to weigh freight, because

“... statutes, which restrict private rights of persons, or the use of property in which the public has no concern, should be strictly construed in favor of the citizen. It will never be presumed that the legislature intends to impose burdens upon the citizen or interfere with his primary rights, further than is demanded by the general welfare. While it is a matter of public concern that traders and dealers by profession, engaged in buying and selling, and millers, should be required to use standard weights and measures, and their regulation is within the police power, it is no concern whatever to the public whether persons using such weights and measures for purely personal, domestic, or agricultural purposes, do so.”

A similar view was taken of private property rights in *State ex rel Ice and Fuel Co. v Kreuzweiser* (120 Ohio St. 352, 166 N. E. 228):

"Statutes or ordinances which restrain the exercise of such rights, or impose restrictions upon the use of private property will always be strictly construed, and the scope of such statutes or ordinances cannot be extended to include limitations not therein clearly prescribed."

And in *Gray v Stewart* (70 Kan. 429, 78 Pac. 852), where the statutory provision was involved which provided for the management and administration of the estates of persons imprisoned in the penitentiary, the court also recognized the rule with reference to natural rights:

"Being in derogation of the natural rights of persons to hold and manage their own property, the sections must be strictly construed and their provisions extended no further than the clear import of their terms requires. In this they are analogous to the case where a spendthrift is deprived by statutory proceedings of his natural right to manage his own property."

§ 248. **Statutes in Derogation of the Common Law.**⁹⁵—As a general rule, statutes in derogation of the common law must also be strictly construed.⁹⁶ Or stated more specifically, statutes of this type should not be construed to modify or abrogate the common law any further than is expressly stated,⁹⁷ or necessarily implied from

⁹⁵ Also see § 228, *supra*.

⁹⁶ *In re Dunphy*, 60 Colo. 196, 153 Pac. 89; *Bickart v Sanditz*, 105 Conn. 766, 136 Atl. 580; *Ex parte Amos*, 93 Fla. 5, 112 So. 289; *People v Taylor*, 342 Ill. 88, 174 N.E. 59; *Hammell v State*, 198 Ind. 45, 152 N.E. 161; *Howard v Howard*, 120 Me. 479, 115 Atl. 259; *Risser v Hoyt*, 53 Mich. 185, 18 N.W. 611; *Hill v Hill*, 93 N.J. Eq. 567, 117 Atl. 256, aff. 95 N.J. Eq. 233, 122 Atl. 818, 29 A.L.R. 1242; *State v Haynie*, 178 N.C. 493, 101 S.E. 33; *State v Cooper*, 120 Tenn. 549, 113 S.W. 1048; *Norfolk, etc., R. Co. v Virginian R. Co.*, 110 Va. 631, 66 S.E. 863; *Carter v Reserve Gas. Co.*, 84 W.Va. 741, 100 S.E. 738. But where the statute is also remedial, a more liberal construction is proper. *Wolf v Keagy*, 33 Dela. 362, 136 Atl. 520; *Crawford v Swicord*, 147 Ga. 548, 94 S.E. 1025; *Stem v Nashville Interurban R. Co.*, 142 Tenn. 494, 221 S.W. 192. Also see *Archer v Equitable Life Assur. Soc.*, 218 N.Y. 18, 112 N.E. 433, and *Ex parte Dexter*, 93 Vt. 304, 107 Atl. 134.

⁹⁷ *Jones v Crosswell*, 60 Fed. (2) 827; *Indianapolis v Indianapolis Water Co.*, 185 Ind. 277, 113 N.E. 369; *Wood v Tunncliffe*, 74 N.Y. 38; *Roxana Petroleum Co. v Cope*, 132 Okla. 152, 269 Pac. 1084, 60 A.L.R. 837; *Gratz v Insurance Co. of N. America*, 282 Pa. 224, 127 Atl. 620; *Linder v Metrop. Life Ins. Co.*, 148 Tenn. 236, 255 S.W. 43; *Strother v Lynchburg Trust, etc., Bank*

the language used.⁹⁸ In accord with this rule, the common law should not be deemed changed, unless the language making the alleged change is clear and unambiguous.⁹⁹ Indeed, it is not to be presumed that the legislature intended to make an innovation on the common law.¹⁰⁰

This rule of strict construction, however, as we have previously indicated,¹⁰¹ has been subjected to considerable criticism,¹⁰² and in some states it has been abrogated by legislation which requires statutes in derogation of the common law to be liberally construed,

(Va.) 156 S.E. 426, 73 A.L.R. 166. And so "damages for injuries to the person" should be interpreted to mean damages which are the result of a direct injury to the person of the plaintiff and not those, which, as in this case, were sustained by the plaintiff in consequence of direct injury to the person of another. In other words, the husband could not recover for money expended for medical attention to his wife. *Wilson v Grace (Mass.)* 173 N.E. 525. Similarly, statutes relating to the service of process, where in derogation of the common law, are subject to strict construction. *Null v Staiger (Pa.)* 4 Atl. (2) 883.

⁹⁸ *Edginton v Aetna Life Ins. Co.*, 77 N.Y. 564; *In re Pittsburgh*, 243 Pa. 392, 90 Atl. 329; *Linder v Metrop. Life Ins. Co.*, 148 Tenn. 236, 255 S.W. 43; *Strother v Lynchburg Trust, etc., Bank (Va.)* 156 S.E. 426, 73 A.L.R. 166; *Allen v Griffin*, 132 Wash. 466, 232 Pac. 363. In case of doubt, however, the construction will favor a continuation of the common law rather than its abrogation. *Ekern v McGovern*, 154 Wis. 157, 142 N.W. 595.

⁹⁹ *Cox v St. Anthony Bank & Trust Co.*, 41 Idaho 776, 242 Pac. 785; *State ex rel v Dist. Court*, 69 Mont. 29, 220 Pac. 88; *Ex parte Dexter*, 93 Vt. 304, 107 Atl. 134.

¹⁰⁰ *Cox v St. Anthony Bank & Trust Co.*, 41 Idaho 776, 242 Pac. 785; *People v Phyfe*, 136 N.Y. 554, 32 N.E. 978, 19 L.R.A. 141; *Sullivan v Tomah School Dist.*, 179 Wis. 502, 191 N.W. 1020.

¹⁰¹ See § 241, supra.

¹⁰² "The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law." *Johnson v Southern Pac. Co.*, 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363. Moreover, the rule of strict construction does not apply with the same strictness where the particular provision relied on is remedial in character. *Wolf v Keagy (Del.)* 136 Atl. 520 (married women's act). For further criticism of the rule, note the following language taken from 14 Ore. L.Rev. 290 (1935): "There seems to be no valid reason why the sanctity of the common law should rise higher than legislative purposes, or that the common law should be restrictive of the statutory. It is submitted that the protection of common rights rests with the organic law rather than with the common law and that a consistent judicial interpretation based thereon is the arch enemy of progress."

with a view to promote justice and to effect their objects.¹⁰³ But even in these states, the substitution of the rule of liberal construction does not justify a strained construction,¹⁰⁴ nor one which will defeat the intent of the legislature,¹⁰⁵ for the court must not struggle to defeat the purpose of the legislature, but on the contrary, to make it effective.¹⁰⁶

§ 249. Some Illustrative Cases.—A few illustrative cases will further indicate how the courts actually construe statutes in derogation of the common law. In the recent case of *Walter v Northern Insurance Company* (370 Ill. 283, 18 N. E. (2) 906), a statute provided: "If two or more persons actually do an unlawful act, with force or violence, against the person or property of another, with or without a common cause of quarrel, or even a lawful act in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a riot." The court refused to hold the statute applicable to a case where certain persons, in the night-time, without disturbing any one and not in defiance of constituted authority, but by stealth, caused damages to a house by smearing creosote on it, because to constitute a riot, at common law, it was necessary that there be three or more persons tumultuously assembled of their own authority with intent mutually to assist one another against all who shall oppose them in the doing either of an unlawful act of a private nature or of a lawful act in a violent and tumultuous manner. Moreover, the following quotation from *Reeder v LeHigh Valley Coal Co.* (231 Pa. 563, 80 Atl. 1121) is especially enlightening:

"When the legislature takes a step in advance of the common law and imposes additional burdens upon an employer to meet the necessities of modern industrial growth, the new duties

¹⁰³ See §§ 417-418, *infra*. Also see *In re Garrs Estate*, 31 Utah 57, 86 Pac. 757; *O'Connor v State* (Tex.) 71 S.W. 409; *Sutton v Sutton*, 87 Ky. 216, 8 S.W. 337; *Chiesa & Co. v City of Des Moines*, 158 Iowa 343, 138 N.W. 922; *Stowe v Merrilees* (Calif.) 44 Pac. (2) 368; *Conley v Conley*, 92 Mont. 425, 15 Pac. (2) 922.

¹⁰⁴ *Boswell v Senn*, 187 Ky. 473, 219 S.W. 803.

¹⁰⁵ *In re Dolmage*, 203 Iowa 231, 215 N.W. 746.

¹⁰⁶ *Heiden v City of Milwaukee* (Wis.) 275 N.W. 922. And see *Gibson v Jenney*, 15 Mass. 205: "It is said that statutes made in derogation of the common law, are to be strictly construed. This is true, but they are also to be construed sensibly, and with a view to the object aimed at by the legislature." Also note *Johnson v Southern Pac. Co.*, 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363.

thus imposed should be so clearly set forth as to leave no doubt as to the legislative intention."

Consequently, an act which required all dangerous machinery to be used in or about mines to be protected by a covering or railing, did not include within its scope a trolley wire. This same concern for rights under the common law also appears in cases where procedural statutes are involved, as is well indicated in *Snider v Cochran* (80 W. Va. 252, 92 S. E. 347):

"The statutory provisions relied upon by the plaintiffs as precluding the right of defense upon the merits of the case both derogate from the common law and regulate or restrict the great constitutional right of trial by jury. At the same time it bars meritorious defenses for mere misconduct in litigation, non-compliance with statutory requirements. For these reasons, they must be strictly construed."

Yet the doctrine that statutes creating rights which were unknown to the common law or to equity must be strictly construed, was never meant to be applied as a pitfall to the unwary, who are in good faith pursuing the path marked by the statute, nor as an ambushade from which an adversary can overwhelm him for an immaterial misstep. On the contrary, the doctrine was meant to preserve the substantial rights of those against whom the remedy offered by the statute is directed, and it is never to be employed otherwise.^{106a} Where the court takes this attitude, a large amount of the criticism against subjecting statutes in derogation to the common law, loses its foundation.

§ 250. The Rule of Strict Construction of Statutes in Derogation of the Common Law Justified.—Nevertheless, the rule that statutes in derogation of the common law must be strictly construed, is strongly entrenched in our law. To understand the rule, it is necessary to resort to history.

"The rule that statutes in derogation of the common law are to be strictly construed, was introduced at an early day when the common law was in its integrity; when courts and writers like Coke, ignorant of other systems, spoke of it as the perfection of human wisdom, and were jealous of every attempt of Parliament to change it in the minutest particular, and defended its most outrageous provisions by arguments which to

^{106a} U.S. v Cork Cas. v Valland, 365 Ill. 564, 7 N.E. (2) 301, rev. 284 Ill. 652, 2 N.E. (2) 579.

us are the perfection of unreason and absurdity; when parliament itself very seldom undertook to modify or add to it. And it would seem that modern courts and judges have repeated the rule without any knowledge of its origin and without any thought of the enormous changes in the relations between the courts and the legislature which have taken place since the rule was promulgated. In fact, the reason for the rule, or rather the occasion of it, for there never was any reason for it, has entirely passed away. It is a demonstrable proposition, that there is hardly a rule or doctrine of positive practical jurisprudence in England or in the United States today, which is not the result, in part at least, of legislation; hardly a rule or doctrine of the original common law which has not been abolished, or changed, or modified by statute. Furthermore, it is conceded that the ancient conception as to the perfection of the common law was absurdly untrue. The great mass of its practical rules as to property, as to persons, as to obligations, and as to remedies, were arbitrary, unjust, cumbersome, barbarous. For the last generation, the English parliament and our state legislatures have been busy in abolishing these common law rules, and in substituting new ones by means of statutes. That all this remedial work, all this benign and necessary legislative endeavor to create a jurisprudence scientific in form and adopted to the wants of the age, should be hampered, and sometimes thwarted by a parrot-like repetition and unreflecting application of the old judicial maxims that statutes in derogation of the common law are to be strictly construed, is, to say the least, absurd." Sedgwick—Construction of Statutes (1st ed.) p. 270.

This would indicate that the reason for subjecting statutes which abrogate the common law to a strict construction is founded upon a belief that the common law represented the zenith of human wisdom. Originally, that was probably true. And to some extent, we have continued to adhere to the common law because of our respect for tradition. If these two facts constitute the reason for the rule, admittedly there is little reason for adhering to it.

There would seem, however, to be a stronger and a more appealing reason which may be urged in favor of the strict construction of statutes in derogation of the common law, and especially if we regard the common law in its most comprehensive sense. After all, as Dean Pound has so ably said, "we have in every developed body of law two elements, in the legal system, an imperative element, resting upon the authority of the State, and a traditional element resting upon the experience of the past in the adjudication of con-

troversies". This latter element forms the common law. It includes, so said the court in *State v Lafferty* (Tapp (Ohio) 113), "those maxims, principles and forms of judicial proceedings which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason have, by usage and custom, become interwoven with the written laws; and, by such incorporation, form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of a savage life, to civilization, order and a government of law".

Must it not be admitted that civilization is built upon those customs which make up the common law? After all, there is perhaps as much reason for subjecting a statute which abrogates the common law to a strict construction, as it is to indulge in the presumption against the implied repeal of a statute. And the common law is, after all, the consummation of man's experiences, and although time may demonstrate the error of his ways, for the present it may provide harmony and operate equitably. Laws thus built up by custom would seem to occupy as high a status in our legal system as legislative enactments, for in the latter case, the law becomes such through the action of the representatives of the people, while in the former, they receive their effect directly from the people. If laws may be repealed by desuetude, a kind of silent legislation, why may they not be created by the same general process?

"... yet as the whole community includes as well the legislative power as its subjects, total disuse of any civil institution for ages past, may afford just and rational objections against disrespected and superannuated ordinances . . . it is the characteristic of a system of common law, that it may be accommodated to the circumstances, the exigencies, and the conveniences of the people by whom it is appointed. Now as these circumstances, exigencies, and conveniences silently change, a proportionate change in time and in degree must take place in the accommodated system. Time silently and gradually introduces; it silently and gradually withdraws its customary laws." Per Duncan, J., in *James v Commonwealth*, 12 Serg. & R. (Pa.), 220, 228.

Laws thus established by the people would certainly seem entitled to the status which will be accorded them by the rule which requires statutes in derogation of the common law to be construed strictly.

Even if a narrow meaning is given to the term "common law", certain statutes are undoubtedly entitled to a strict construction. One critic of the general rule recognizes the desirability of this attitude, when he writes:

"What, then, is the true limit and application of the rule? With all the gross imperfection of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules both of primary right and of procedure, which protected personal rights—rights of property, of life, of liberty, of body, and of limb—against the encroachments of both government and of private individuals. This was the great glory of the common law. Any statutes which should take away, change, or diminish these rights should be strictly construed. To this extent the rule is in the highest degree valuable, not because such statutes 'are in derogation of common law' but because they oppose the overwhelming power of the government to the feeble power of resistance of the individual, and it is the duty of courts under such circumstances to guard the individual as far as is just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal." Sedgwick, *Construction of Statutes* (1st ed.), p. 271.

§ 251. **Remedial Statutes.**¹⁰⁷—Remedial statutes,¹⁰⁸ that is, those which supply defects, and abridge superfluities, in the former

¹⁰⁷ See § 73, *supra*, for comparison with penal statutes and for a general discussion. Also see § 243, *supra*, for statutes, part penal and part remedial.

¹⁰⁸ Remedial statutes were involved in the following cases: *Ex parte Plowman*, 53 Ala. 440 (official bond); *Colorado Milling, etc., Co. v Mitchell*, 26 Colo. 284, 58 Pac. 28 (employer's liability act); *Beall v Beall*, 8 Ga. 210 (illegitimate child); *Harrison v Monmouth Nat. Bank*, 207 Ill. 630, 69 N.E. 871 (action on negotiable instrument); *Charles v Lamberson*, 1 Iowa 435 (exemption statute); *Merkle v Bennington Township*, 58 Mich. 156, 24 N.W. 776 (survival of action on wrongful death); *Becker v Brown*, 65 Neb. 264, 91 N.W. 178 (agister's lien). Most courts regard statutes pertaining to the survival of action on wrongful death to be remedial, *Hayes v Williams*, 17 Colo. 465, 30 Pac. 352; *Merkle v Bennington*, *ibid*; *Bolinger v St. Paul & D. R. Co.*, 36 Minn. 418, 31 N.W. 856; *Haggerty v Central R. Co.*, 31 N.J.L. 349. *Contra*: *Hamilton v Jones*, 125 Ind. 176, 25 N.E. 192; *Pittsburgh, etc., R. Co. v Hine*, 25 Ohio St. 629.

law,¹⁰⁹ should be given a liberal construction,¹¹⁰ in order to effectuate the purposes of the legislature,¹¹¹ or to advance the remedy intended,¹¹² or to accomplish the object sought,¹¹³ and all matters fairly within the scope of such a statute should be included, even though outside the letter, if within its spirit or reason.¹¹⁴ But, as we have

¹⁰⁹ 1 Blackstone, Comm. 86. Also note *Barkley v Conklin* (Tex.) 101 S.W. (2) 405, and *Falls v Key* (Tex.) 278 S.W. 893.

¹¹⁰ *Harrington v State*, 200 Ala. 480, 76 So. 422; *In re Patterson*, 155 Calif. 626, 102 Pac. 941; *Wolcott v Pond*, 19 Conn. 597; *Amos v Conkling*, 99 Fla. 206, 126 So. 283; *Honore v Wilshire*, 109 Ill. 103; *Potter Mfg. Co. v Meyer* (Ind.) 86 N.W. 837; *Osgood v Names*, 191 Iowa 1227, 184 N.W. 331; *Van Doren v Wolf*, 112 Kan. 380, 211 Pac. 144; *Shea v Peters*, 230 Mass. 197, 119 N.E. 746; *State v Baldwin*, 62 Minn. 518, 65 N.W. 80; *State v Public Serv. Comm.* (Mo.) 34 S.W. (2) 37; *Becker v Brown*, 65 Neb. 264, 91 N.W. 178; *Lockhart v Hoffman*, 197 N.Y. 331, 90 N.E. 943; *Weston v J. L. Roper Co.*, 160 N.C. 263, 75 S.E. 800; *Sayer v Lee*, 40 S.D. 170, 166 N.W. 635; *Kitts v Kitts*, 136 Tenn. 314, 189 S.W. 375; *Cousins v Sovereign Camp, W.O.W.* (Tex.) 35 S.W. (2) 696; *Hechler v Kemp*, 122 Va. 528, 95 S.E. 400; *Hasson v Chester*, 67 W.Va. 278, 67 S.E. 731; *Bauman v West Allis*, 187 Wis. 506, 204 N.W. 907. If the remedial statute affects vested rights or constitutes an exercise of the police power, it should be liberally construed. *Amos v Conkling*, 99 Fla. 206, 126 So. 283; *Peet v East Grand Forks*, 101 Minn. 523, 112 N.W. 1005. And a statute creating a liability, not otherwise existing, or increasing a common law liability, though remedial, will be strictly construed. *Leppard v O'Brien*, 232 N.Y. S. 454, aff'd 252 N.Y. 563, 170 N.E. 144.

¹¹¹ *Grier v Kennan*, 64 Fed. (2) 605; *In re Patterson*, 155 Calif. 626, 102 Pac. 941; *Shea v Peters*, 230 Mass. 197, 119 N.E. 746; *City of Lincoln v Neb. Workmen's Comp. Court* (Neb.) 274 N.W. 576; *Tompkins v Hunter*, 149 N.Y. 117, 43 N.E. 532; *State v Baker*, 88 Ohio St. 165, 102 N.E. 732; *Calef v Steere's Estate*, 47 R.I. 498, 134 Atl. 1; *Kitts v Kitts*, 136 Tenn. 314, 189 S.W. 375.

¹¹² *Fisher v Hervey*, 9 Colo. 16; *Becker v Amos* (Fla.) 141 So. 136; *Haskel v Burlington*, 30 Iowa 232; *Shea v Peters*, 230 Mass. 197, 119 N.E. 746; *State v Public Serv. Comm.* (Mo.) 34 S.W. (2) 37; *Carley v Liberty Hat Mfg. Co.*, 81 N.J.L. 502, 79 Atl. 447; *State v Lipkin*, 169 N.C. 265, 84 S.E. 340; *Wright v Barber*, 270 Pa. 136, 113 Atl. 200; *State v Pullen* (R.I.) 192 Atl. 473; *Baumann v West Allis*, 187 Wis. 506, 204 N.W. 907.

¹¹³ *Amos v Conkling*, 99 Fla. 206, 126 So. 283; *Inabinet v Royal Exchange Assur. Co.* (S.C.) 162 S.E. 599; *Kitts v Kitts*, 136 Tenn. 314, 189 S.W. 375. Also see cases under note 112, *supra*.

¹¹⁴ *Traudt v Hagerman*, 27 Ind. Ap. 150, 60 N.E. 1011; *Harbeck v Pupin*, 123 N.Y. 115, 25 N.E. 311; *Peet v Mills*, 76 Wash. 437, 136 Pac. 685; *Hasson v Chester*, 67 W.Va. 278, 67 S.E. 731. Conversely, matters within the letter but without the spirit will be excluded. *Traudt v Hagerman*, 27 Ind. Ap. 150, 60 N.E. 1011.

stated elsewhere,¹¹⁵ a liberal construction does not justify an extension of the statute's scope beyond the contemplation of the legislature, even if the statute is purely remedial and a liberal construction would produce a result highly beneficial or desirable. To adopt a contrary view, would clearly violate the tri-partite theory of government and permit the court to exercise legislative power.

§ 252. Reason for the Liberal Construction of Remedial Statutes, Generally.—To understand the reason for giving remedial statutes a liberal construction, it is necessary that we know what statutes fall within this category. While they have been defined in a preceding section, for the sake of convenience, some slight repetition will be valuable. For our discussion here, however, it will be sufficient to define a remedial statute as one which remedies a defect in the common law or in the pre-existing body of statute law. Such statutes play an important part in the jurisprudence of an advancing society. They supply the defects and abridge the superfluities in pre-existing law, which arise from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of judges, and from any other cause. They serve to keep our system of jurisprudence up-to-date and in harmony with new ideas or conceptions of what constitute justice and proper human conduct. Their legitimate purpose is to advance human rights and relationships. Unless they do this, they are not entitled to be known as remedial legislation nor to be liberally construed. Manifestly, a construction which promotes improvement in the administration of justice and the eradication of defects in our system of jurisprudence, should be favored over one which perpetuates wrong. It seems proper to assume that the law-makers intended to advance our laws forward as far as our conceptions of justice and proper conduct extend. For this reason, if no other, remedial legislation is entitled to a liberal construction.

§ 253. Barriers to the General Application of the Rule of Liberal Construction to All Remedial Acts.—Several apparent barriers exist to a general application of the rule of liberal construction to all remedial acts. In the first place, they may operate retrospectively, and for this reason might seem entitled to a strict construction. But, under our discussion of retroactive legislation, because

¹¹⁵ See § 238, *supra*.

of the obvious purpose of remedial legislation to remedy mischief, promote public justice, correct mistakes, and cure irregularities, such legislation is nevertheless to be subjected to a liberal construction. As was indicated by the court in *Ex parte Buckley* (53 Ala. 42), only where a statute of a remedial nature takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes new duties, or attaches new disabilities, in respect to transactions already past, is it a condemned retrospective law. And where this is the effect of a statute it is not remedial; it is destructive.

In the second place, a statute may be remedial and penal. As we have indicated in a preceding section of this chapter, there is considerable confusion in the cases as to the type of construction to be accorded statutes having this characteristic. While the problem of determining the type of construction to be used in interpreting a statute of this dual nature, is removed by placing the statute into the general class of penal statutes merely because it provides a penalty, it is possible that the penal portion may not be involved in a given case. Where this is true, it is difficult to see any objection to regarding it as a remedial statute so far as its construction is concerned.

Obviously, remedial legislation is often in derogation of the common law. Here, again, the question arises whether the remedial statute shall be strictly construed because it is in derogation of the common law, or whether it should be given a liberal construction because it is remedial. This dilemma, along with the belief that the beneficent purposes of remedial legislation supersedes the benefits derived from closely adhering to the common law, undoubtedly played a part in the enactment of legislation requiring the liberal construction of remedial statutes. Nevertheless, as such legislation abrogating the rule of strict construction does not exist in all jurisdictions, the problem or dilemma still remains. Some cases also seem to assume the attitude that the rule of strict construction should not be as rigidly applied in these instances. This, of course, gives paramount importance to the common law. Undoubtedly, in many instances, this is the proper view, particularly where basic human rights are involved; but where the remedial legislation is clearly in accord with the people's conception of progress in ideas of justice and proper conduct, there is very little that can be raised in opposition to a liberal construction of such legislation, particu-

larly where the statute is purely remedial and has no penal features, and does not destroy or impair vested rights so as to be objectionable as retrospective legislation. In fact, where remedial legislation constitutes simply a declaration of the standards of the people as derived from their experiences and conduct, a statute enacting such legislation into law can hardly be said to be derogative of the common law in its widest sense.

§ 254. Statutes Pertaining to Remedies and Procedure In General.—Statutes which relate to remedies and procedure, perhaps because they are remedial in character, should also receive a liberal construction in order to promote justice and to carry out their respective purposes,¹¹⁶ and especially so as to secure a more effective, a speedier, a simpler, and a less expensive administration of the law.¹¹⁷ And while this does not mean that the negligent litigant should be favored over the one who has been diligent,¹¹⁸ it

¹¹⁶ *Coleman v Bercher*, 94 Ark. 345, 126 S.W. 1070; *Shields v Johnson*, 10 Idaho 454, 79 Pac. 394; *Coats v Barrett*, 49 Ill. Ap. 275; *Collins v Hayden*, 104 Kan. 351, 179 Pac. 308; *Boos v McClendon*, 130 La. 813, 58 So. 582; *Moore v Stoddard*, 206 Mass. 395, 92 N.E. 502; *McManus v Park*, 287 Mo. 109, 229 S.W. 211; *Hill v Hill*, 93 N.J. Eq. 567, 117 Atl. 256, aff. 95 N.Y. Eq. 233, 122 Atl. 818, 29 A.L.R. 1242; *People v Thorn*, 156 N.Y. 286, 50 N.E. 947, 42 L.R.A. 368; *Baker v Hare*, 192 N.C. 788, 136 S.E. 113; *Smith v Hoff*, 20 N.D. 419, 127 N.W. 1047; *Duggan v Duggan*, 291 Pa. 556, 140 Atl. 342; *Rodgers v Fleming* (Tex. Com. Ap.) 3 S.W. (2) 77; *Green v Lum*, 147 Va. 392, 137 S.E. 484. This rule applies to statutes pertaining to criminal procedure, since they are not penal but procedural. *People v Bailey*, 171 N.Y.S. 394, 103 Misc. 366. It also applies to appeals. *City of Athens v Evans* (Tex.) 63 S.W. (2) 379; also see § 251, *supra*, Remedial Statutes. Among procedural statutes liberally construed, are statutes of jeofails and amendment, *State ex rel Smith v Trimble*, 315 Mo. 166, 285 S.W. 729, statutes relating to appeals; *McNutt v State*, 163 Ark. 122, 259 S.W. 1, set-off; *Bates v Lanier*, 75 Fla. 79, 77 So. 628, change of venue; *Gregory Printing Company v De Voney*, 257 Ill. 399, 100 N.E. 1066, statute providing for the assertion of equitable defenses in actions at law, *Ballentine v Bradley* (Ala.) 182 So. 399. And in a doubtful case, the court will incline toward that interpretation which will admit rather than reject evidence. *Collins v Hayden*, 104 Kan. 351, 179 Pac. 308.

¹¹⁷ *Scott v Mayor*, 186 Ga. 652, 198 S.E. 693; *Baker v Hare*, 192 N.C. 788, 136 S.E. 113; *Eagle-Picher Lead Co. v Mansfield Paint Co.*, 194 N.Y.S. 386, 201 Ap. Div. 223.

¹¹⁸ *Heman v McNamara*, 77 Mo. Ap. 1; *S. L. & Co. v Bock*, 194 N.Y.S. 420, 120 Misc. 687; *Cornman v Hagginbotham*, 227 Pa. 549, 76 Atl. 721; *Thrift v Thrift*, 30 R.I. 357, 75 Atl. 484; *Sawyer v Childs*, 83 Vt. 329, 75 Atl. 886.

does mean that the statute should receive a construction which will not sacrifice the rights of the litigants to technical mistakes, omissions, or inaccuracies.¹¹⁹ Nor does it mean that the court can defeat the obvious intention of the legislature.¹²⁰

But statutes which create new and extraordinary remedies,¹²¹ or remedies unknown to the common law,¹²² or which alter or abrogate fundamental rights,¹²³ even where they relate to remedies and procedure, must be strictly construed.¹²⁴ They constitute an exception to the general rule that statutes pertaining to remedies and procedure must be given a liberal construction. On the other

¹¹⁹ *Coleman v Bercher*, 94 Ark. 345, 126 S.W. 1070.

¹²⁰ *Youngman v New York Indemnity Co.*, 199 N.Y.S. 420, 120 Misc. 687; *Stark County Agric. Soc. v Walker*, 34 Ohio Ap. 558, 171 N.E. 422; *Cornman v Hagginbotham*, 227 Pa. 549, 76 Atl. 721.

¹²¹ *Campbellsville Lumber Co. v Hubbert*, 112 Fed. 718, 50 C.C.A. 435, aff. 191 U.S. 70, 48 L.Ed. 101, 24 S.Ct. 28; *People v Ryder*, 124 N.Y. 500, 26 N.E. 1040. Also note *Butler v U.S. (U.S.)* 43 Ct. Cl. 497; *Jones v Newhall*, 115 Mass. 244. But see *Shields v Johnson*, 10 Idaho 454, 79 Pac. 394, and *Scott v Mayor*, 186 Ga. 652, 198 S.E. 693.

¹²² *Crowder v Fletcher*, 80 Ala. 219; *The Hamburg*, 2 Iowa 460; *People v Bailey*, 171 N.Y.S. 394, 103 Misc. 366. This is especially true where the statute authorizes a summary proceeding. *Guaranty Trust & Safe Deposit Co. v Green Cove, etc., R. Co.*, 139 U.S. 137, 11 S.Ct. 512, 35 L.Ed. 116 (constructive service); *In re Roberts*, 4 Kan. Ap. 292, 45 Pac. 942; *Willard v Fralick*, 31 Mich. 431 (judgment on sureties without separate action); *Mathews v Densmore*, 43 Mich. 461, 5 N.W. 669 (attachment); *Stewart v Stringer*, 41 Mo. 400 (constructive service); *In re Robinson's Estate*, 112 N.Y.S. 280, 59 Misc. 323; *Murphy v Chase*, 103 Pa. 260 (sale of property without warranty); *Robinson v Schmidt*, 48 Tex. 13 (action on official bond by motion).

¹²³ *Kreuter v State*, 202 Ala. 287; *Hill v Hill*, 93 N.J. Eq. 567, 117 Atl. 256, aff. 95 N.J. Eq. 233, 122 Atl. 818, 20 A.L.R. 1242.

¹²⁴ *Wilbur v Crane (Mass.)* 13 Pick. 284; *People v Bailey*, 171 N.Y.S. 394, 103 Misc. 366; *Western Electric Co. v Goldstein*, 23 Pa. Dist. 725. Some authorities subject statutes simplifying pleading to strict construction. *St. Louis, etc., R. Co. v Town of Summit*, 3 Ill. Ap. 155; *Lawry v Lawry*, 88 Me. 482, 34 Atl. 273; *Canton Nat. Bldg. Ass'n v Weber*, 34 Md. 669; *Degau v Elmore*, 50 N.Y. 1. But see apparently contra: *Conaughty v Nichols*, 42 N.Y. 83; *Greentree v Rosenstock*, 61 N.Y. 583; *Gartner v Corwine*, 57 Ohio St. 246, 48 N.E. 945. Also see discussion in Pound, *Common Law and Legislation*, 21 Harv. L.Rev. 333 (1908). Also see § 256, *infra*.

hand, statutes of limitations,¹²⁵ constitute an important class of legislation, which should be liberally construed¹²⁶ in order to effectuate the general intention of the legislature,¹²⁷ and especially where they relate to real estate.¹²⁸ Statutes of limitations should not, therefore, receive a construction that will create exceptions or qualifications not clearly expressed.¹²⁹ Nevertheless, if a statute of this type contains a provision excepting certain persons from its operation, those exceptions should be strictly construed.¹³⁰ In other words, the court will not extend the exceptions beyond those ex-

¹²⁵ That statutes of this kind are remedial in their nature, see *Toll v Wright*, 37 Mich. 93; *Rutter v Carothers*, 223 Mo. 631, 122 S.W. 1056, and *Burleigh County v Kidder County* (N.D.) 125 N.W. 1063. Thus, if they are not considered procedural, they would be entitled to a liberal construction by virtue of the rule pertaining to remedial statutes generally. See § 251, *supra*. For additional treatment of statutes of limitations, see § 349, *infra*.

¹²⁶ *Warren v Clemenger*, 120 Ill. Ap. 435; *State v Yates*, 231 Mo. 276, 132 S.W. 672; *Toll v Wright*, 37 Mich. 93; *Koop v Cook*, 67 Ore. 93, 135 Pac. 317. But note *Kilpatrick v Byrne*, 25 Miss. 571, where a liberal construction was proper, since the statute was a beneficial one permitting refiling of an action within one year, if defeated for any matter of form. Also see *Pleadwell v Mo. Glass Co.*, 151 Mo. Ap. 51, 131 S.W. 941. It has also been held that a short statute of limitation should be construed strictly. *St. Louis, etc., R. Co. v Batesville*, 86 Ark. 300, 110 S.W. 1047. Statutes of limitations, when urged against the government, should receive a strict construction. *U.S. v Whited*, 246 U.S. 552, 38 S.Ct. 367, 62 L.Ed. 879. But note *St. Paul v Chicago, etc., R. Co.*, 45 Minn. 387.

¹²⁷ *Warren v Clemenger*, 120 Ill. Ap. 435; *State v Yates*, 231 Mo. 276; *Olcott v Tioga R. Co.*, 20 N.Y. 210; *Slater v Cave*, 3 Ohio St. 80. They should, at least, receive a reasonable construction. *Campbell v Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280; *Smith v Smith*, 91 Mich. 7, 51 N.W. 694; *Rutter v Carothers*, 223 Mo. 631, 122 S.W. 1056; *Blackwell v Memphis*, 124 Tenn. 516, 137 S.W. 486.

¹²⁸ *Phillips v Pope*, 10 Mon. (Ky.) 163.

¹²⁹ *U.S. v Norris*, 222 Fed. 14, 137 C.C.A. 552; *Davis v Hart*, 123 Calif. 384, 55 Pac. 1060; *Swichard v Bailey*, 3 Kan. 507; *Hahn v Claybrook*, 130 Md. 179, 100 Atl. 83; *Collins v Pease*, 146 Mo. 135, 47 S.W. 925; *Musgrave v McManus*, 24 N.M. 227, 173 Pac. 196; *Lawson v Tripp*, 34 Utah 28, 95 Pac. 520; *Woodbury v Shackelford*, 19 Wis. 55.

¹³⁰ *Lawson v Tripp*, 34 Utah 28, 95 Pac. 520. Also see *Davis v Mills*, 121 Fed. 703, 58 C.C.A. 123; *Hauser v Thompson*, 56 Mo. Ap. 85; *Dringman v Keim*, 86 Neb. 476, 125 N.W. 1080; *Musgrave v McManus*, 24 N.M. 227, 173 Pac. 196; *Fish v Jenewein*, 75 Wis. 254, 43 N.W. 950, 44 N.W. 515.

pressly and clearly mentioned, or perhaps implied from the general purpose and design of the law.¹³¹

§ 255. **Reason for the Liberal Construction of Statutes Relating to Remedies and Procedure.**—Of course, back of statutes relating to remedies and procedure, a reason exists for subjecting them to a liberal construction. Such statutes are obviously designed and intended to expedite justice. If a person has a right and it has been infringed, considerations of justice demand that the right be protected, and protected as promptly, economically and effectively as possible. Statutes which relate to procedure and to remedies are intended to accomplish this very purpose. That is their legitimate justification—a design which the legislature must be presumed to intend to promote. Unless a procedural statute operates to create a more effective and satisfactory administration of our system of jurisprudence, it is not entitled to a construction which makes its effect widely operative. In such a case, an effect of this nature would seem to indicate that such a construction did not represent the legislative intent, and a strict construction would in fact be more likely to achieve a result which would be in harmony with the real intention of the law-makers.

Obviously, therefore, remedial and procedural statutes also provide the means whereby human rights are protected. Since such rights are the objects of the law's concern, any statute designed to protect those rights is for that reason entitled to a liberal construction.

On the other hand, if procedural and remedial acts were to be strictly construed, generally, in many instances, the rendition of justice would be greatly hampered. Even though our ideas of justice, or our standards of ethical conduct, advance, unless our meth-

¹³¹ *McIvers v Ragan*, 2 Wheat. (U.S.) 25, 4 L.Ed. 175; *Helbig v Citizens Ins. Co.*, 234 Ill. 251, 84 N.E. 897. And see *Tynan v Walker*, 35 Calif. 634, where the court quotes from and approves *Beckford v Wade* (Eng.) 17 Vesey Jr. 87, upon the subject of implied exceptions: "Many cases have been put where the law implies an exception, and takes infants out of general words by what is called a virtual exception. I have looked through all the cases, and the only rule to be drawn from them is, that where the words of a law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature manifested by other parts of the law—from the general purpose and design of the law, and from the subject matter of it."

ods of securing such justice also advance, the former may fail of application to human controversies. Remedies and procedure are intended to protect and preserve our rights. When the former are ineffective, or unduly hampered because of too much rigidity, the latter may be destroyed. After all, what is a right, if it has no remedy? So far as procedural statutes are concerned, they should always occupy a secondary status when they conflict with rights. If in accord with the obvious legislative intent, the court should always give a procedural or remedial act that meaning which will best promote or protect the right sought to be vouchsafed thereby.

§ 256. Statutes Simplifying Procedure—Rules of Court.—The enactment of statutes intended to simplify procedure, particularly where they authorize the courts to promulgate rules in aid thereof, create several new problems. As remedial statutes and as statutes pertaining to procedure, they should obviously be subjected to a liberal construction. Where they abrogate common law rules, by virtue of the principle which requires statutes of this character to be construed strictly, they should be subjected to a strict construction. It is apparent, therefore, that in some instances it may be difficult to determine the real nature of the statute, since it may partake of several natures.

The problem, however, to a large extent is removed, if the simplifying statute contains a provision which expressly requires the act to be liberally construed. Such a statute was involved in the case of *People v Village of Wilmette* (294 Ill. Ap. 362, 13 N. E. (2) 990), and the following announcement made by the court—an announcement which seems to present the proper attitude, not only toward the statute, but also toward the rules adopted by the court to carry the statute into force:

“The purpose of the entire act was to simplify the procedure and the prime object of the act was to enable the parties to a cause to have the merits of their controversy passed upon by the courts—the realities considered rather than that the matter be decided on mere technicalities, which often justly bring the courts into disrepute. If the act is to be liberally construed according to the substantive rights of the parties, as it is expressly provided, this purpose will be nullified and the act guillotined by strict construction of rules of court adopted to aid the carrying of the act into force—a strange commentary to construe the act liberally but the rules strictly. But under any act,

strict construction of the rules is not in accord with the decisions of our Supreme Court. . . . We can perceive no reason why rules of court should be interpreted or construed more strictly than statutes in general. . . . Such rules are not mandatory, or in a particular case, for good cause, they may be disregarded. . . . The Civil Practice Act and the rules of court enacted pursuant thereto must not be construed too literally. They will not work if a little 'play in its joints is not allowed'."

Consequently, the rule laid down by the supreme court, which required the service of a copy of the notice of appeal on each appellee and on a co-party not appearing as an appellant, and which provided that a party entitled to service who did not appear in the lower court by an attorney might be served by mail, did not require a notice of appeal by part of the defendants to be served on the defendants who were defaulted. The same view was taken by the court in *Collateral Finance Company v. Braud* (298 Ill. Ap. 130, 18 N. E. (2) 392) where it was held

"... that the Civil Practice Act . . . was adopted to facilitate an orderly disposition of business of the courts and to expedite the prompt administration of justice; that the purpose of the act was to simplify the procedure to enable the parties to a cause to have the merits of their controversies passed upon by the courts; and that to this end the act should be liberally construed. The fact that the report of proceedings was approved and filed before the notice of appeal was served is not contrary to the language and spirit of the act."

A like attitude was assumed by the court in *Stehli Silks Corporation v. Kleinberg* (200 Ap. Div. 16, 192 N. Y. S. 284):

"In order to give the Civil Practice Act the effect which its passage was intended to secure, it must be applied in a broad and liberal spirit, and its provisions must not be restricted by a forced and narrow interpretation, based on the language of former sections in the Code of Civil Procedure, which have been totally superseded by the later legislation."

Lawry v. Lawry (88 Me. 482, 34 Atl. 273, 274), a relatively old case, favors the strict construction of new procedural statutes:

"It would not be wise to depart too far from the established rules of pleading. Constant departures from these rules will soon result in confusion. In the end, it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them."

It would seem, however, that the court, in this case, was chiefly concerned with retaining the old law. The emphasis was placed on

its secondary rather than its primary attribute. The law was construed as a statute in derogation of the common law instead as a remedial statute. It is submitted that the remedial features of statutes simplifying or improving procedure, should be determinative, as a general rule, of the type of construction to which such statutes should be subjected. A liberal construction will undoubtedly, in most instances, tend toward the acceleration of present day efforts to improve our codes of procedure. And, of course, the legislative purpose back of most legislation of this type is to bring about this improvement.

§ 257. **Taxation and Revenue Acts, Generally.**—As a general rule, and in accord with the prevailing view, revenue laws, and particularly tax laws, should be construed in favor of the taxpayer and against the government.¹³² In fact, they are to be con-

¹³² *Crooks v Harrelson*, 282 U.S. 55, 75 L.Ed. 156, 51 S.Ct. 49; *Hecht v Malley*, 265 U.S. 144, 68 L.Ed. 949, 44 S.Ct. 462; *State v Seals Piano Co.*, 209 Ala. 93, 95 So. 451; *Territory v Alaska*, 5 Alaska 325; *Riley v Havens*, 193 Calif. 432, 225 Pac. 275; *Atlantic Coast Line R. Co. v Amos*, 94 Fla. 588, 115 So. 315; *Mystyle Hosiery Shops v Harrison*, 171 Ga. 430, 155 S.E. 765; *People v Noyes*, 295 Ill. 355, 129 N.E. 151; *Frankel v Blank*, 205 Iowa 1, 213 N.W. 597; *Life & Casualty Co. v Coleman*, 233 Ky. 350, 25 S.W. (2) 748; *Moulton v Long*, 243 Mass. 129, 137 N.E. 297; *Miller v Ill. Cent. R. Co.*, 146 Miss. 422, 111 So. 558; *State ex rel Ford Motor Co. v Gehner*, 325 Mo. 24, 27 S.W. (2) 1; *Peterson v Brunzell*, 103 Neb. 250, 170 N.W. 905; *State v Wheeler*, 23 Nev. 143, 44 Pac. 430; *People v Williams*, 198 N.Y. 250, 91 N.E. 634; *In re Lackham*, 26 Ohio N.P.N.S. 387; *McGannon v State*, 33 Okla. 145, 124 Pac. 1063; *Common. v Philadelphia Rapid Transit Co.*, 287 Pa. 190, 134 Atl. 455; *Paris Mountain Water Co. v Woodside*, 133 S.C. 383, 131 S.E. 37; *Boggs v Crenshaw*, 157 Tenn. 261, 7 S.W. (2) 994; *Yellow Cab Co. v Pengilly* (Tex. Civ. Ap.) 11 S.W. (2) 560; *Sussex County v Jarratt*, 120 Va. 672, 106 S.E. 384; *Los Angeles, etc., R. Co. v Richards*, 52 Utah 1, 172 Pac. 474; *Union Trust Co. v Spokane County*, 145 Wash. 193, 259 Pac. 9; *Vinson v Wayne County Ct.*, 94 W.Va. 591, 119 S.E. 808. *Contra*: *State v Taylor*, 35 N.J.L. 184. But statutes enacted to prevent fraud on the revenue, are to be fairly and reasonably construed, in order to carry out the intention of the legislature, even though they impose forfeitures and penalties. *U.S. v Stowell*, 133 U.S. 1, 10 S.Ct. 244, 33 L.Ed. 555. Also see *U.S. v Willetts*, Fed. Cas. No. 16,699; *Verona v Schenley Farms Co.*, 312 Pa. 57, 167 Atl. 317. And where the tax statute relates to procedure, it should be liberally construed like procedural statutes generally. *Fort Lee v Harrington County*, 103 N.J.L. 488, 192 N.E. 236.

strued liberally in favor of the taxpayer,¹³³ and any substantial doubt resolved in favor of the citizen.¹³⁴ Hence, any tax proceedings must be in strict accord with the provisions of the statutes relating thereto.¹³⁵

This view rests, so it would seem, upon the principle that a tax cannot be imposed without the use of clear and express language.¹³⁶ To hold otherwise, would allow the courts to impose taxation,¹³⁷ and that would clearly constitute an encroachment upon the power of the legislature. More than that, taxation is a process which interferes with the personal and property rights of the people, although it is a necessary interference. But because it does take from the people a portion of their property, seems to be a valid reason for construing tax laws in favor of the taxpayer. It is also a destructive power. So far as property rights are concerned, it occupies an analogous position to that occupied by statutes which restrict and destroy personal rights. Accordingly, in case of doubt or of ambiguity, that construction should be adopted which opposes the imposition of the tax.¹³⁸ And, obviously, this strict rule of construction is especially applicable to statutes which impose a privilege tax, or a tax on an occupation,¹³⁹ or impose

¹³³ *Phipps v Comm. of Int. Rev.*, 91 Fed. (2) 627, cert. den. 58 S.Ct. 144. This rule is also applicable with reference to those provisions tending to protect the taxpayer. *People v Mills Novelty Co.*, 237 Ill. 285, 192 N.E. 236.

¹³⁴ *Hadden v S.C. Tax. Comm.*, 183 S.C. 38, 190 S.E. 249.

¹³⁵ *R.C.A. Photophone v Hoffman (Calif.)* 42 Pac. (2) 1059; *McVannel v Pure Oil Co.*, 262 Mich. 518, 247 N.W. 735; *Cuevas v Cuevas*, 145 Miss. 456, 110 So. 865 (time and place of sale); *Flavin v Partello*, 229 N.Y.S. 578, 132 Misc. 325.

¹³⁶ *U.S. v Isham*, 17 Wall. (U.S.) 496, 21 L.Ed. 728; *Lee v Quincy State Bank (Fla.)* 173 So. 909; *People v Barrett*, 309 Ill. 53, 139 N.E. 903; *East Livernore v Livernore Falls Trust Co.*, 103 Me. 418, 69 Atl. 306; *Cabot v Commissioner of Corps.*, 267 Mass. 338, 166 N.E. 852, 64 A.L.R. 1277. In other words, the power to tax is not to be extended by implication. *U.S. Trust Co. v Comm. of Taxation (Mass.)* 13 N.E. (2) 6.

¹³⁷ *In re Krause's Estate*, 325 Pa. 479, 119 Atl. 162. Also see *In re Barber's Estate (Pa.)* 155 Atl. 565.

¹³⁸ *Hecht v Malley*, 265 U.S. 144, 44 S.Ct. 462, 68 L.Ed. 949; *Bingham v Long*, 249 Mass. 79, 144 N.E. 77, 33 A.L.R. 809; *In re Woolsey*, 109 Neb. 138, 190 N.W. 215, 24 A.L.R. 1038; *Anderson v Durr*, 100 Ohio St. 251, 126 N.E. 57, 17 A.L.R. 82; *McGannon v State*, 33 Okla. 145, 124 Pac. 1063.

¹³⁹ *Wilby v State*, 93 Miss. 767, 47 So. 465; *Southern Pac. Ry. Co. v State*, 123 Tenn. 409, 131 S.W. 972.

penalties or forfeitures or deprive the taxpayer of his property by summary proceedings.¹⁴⁰

In the recent case of *Revzan v Nudelman* (370 Ill. 180, 18 N. E. (2) 219), an example of the strict construction of a tax statute will be found. This case involved a sales tax law, and was decided in favor of the taxpayer by subjecting the words "use" and "consumption" to their restrictive meaning of "use up" or "exhaust":

"In the first place it must be remembered that the act imposes a tax only upon persons engaged in the business of selling at retail. No other class is included in its provisions, either expressly or by necessary implication. Defendants insist that the sole leather and rubber heels sold by plaintiffs to repairmen are retail sales, on the theory that such materials are used or consumed by the repairman. This brings us to a consideration of the meaning of the terms 'for use or consumption'. In construing a statute, it is fundamental that taxing laws must be strictly construed. They are not to be extended by implication beyond the clear import of the language used. In case of doubt, they are construed most strongly against the government and in favor of the taxpayer. Strict construction does not require that the words be given the narrowest meaning of which they are susceptible, and words of the act are to be given their full meaning."

Through the use of this same type of construction, the court, in *Bedford v Johnson* (102 Colo. 203, 78 Pac. (2) 373), refused to regard automobile parking lots as falling within the scope of a statute which imposed a tax on general warehouse storage establishments:

"This court has repeatedly held that statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy, and all questions of doubt will be resolved against the government and in favor of the citizen, and because burdens are not to be imposed beyond what the statute expressly imparts."

Although this rule of strict construction generally seems to be a desirable one, yet there appears to be a tendency in some states to depart from it and to subject tax laws to a "reasonable" construc-

¹⁴⁰ *Augusta Commercial Bank v Sandford*, 103 Fed. (2) 98; *Bennett v Hunter*, 9 Wall. (U.S.) 326, 19 L.Ed. 672; *Dickerson v Acosta*, 15 Fla. 614; *Smith v Ryan*, 88 Ky. 636, 11 S.W. 647; *Millett v Mullen*, 95 Me. 400, 49 Atl. 871; *Wilby v State*, 93 Miss. 767, 47 So. 465; *State v Swann*, 46 W.Va. 128, 33 S.E. 89. Also see *Southern Pac. R. Co. v State*, 34 N.M. 479, 284 Pac. 117.

tion.¹⁴¹ But regardless of the rule to be used, the tax statute should not be extended by construction beyond the clear meaning of its language,¹⁴² to include either persons or property not expressly embraced.¹⁴³ Because in all probability it does not represent the legislative intent, an unjust or oppressive construction should be avoided, if possible.¹⁴⁴ For the same reason, double taxation is not to be

¹⁴¹ Cary v U.S., 22 Fed. (2) 298; *Helvering v Stockholms Enskilda Bank*, 293 U.S. 84, 79 L.Ed. 211, 55 S.Ct. 50; *Hubbard v Brainard*, 35 Conn. 563; *People v Atchison T. & S. F. Ry. Co.*, 261 Ill. 156, 103 N.E. 616; *In re Conway's Estate*, 72 Ind. App. 303, 120 N.E. 717; *In re Detroit & Windsor Ferry Co.*, 227 Mich. 143, 198 N.W. 725; *Fuller v South Carolina Tax. Comm.*, 128 S.C. 14, 121 S.E. 478; *Knox v Emerson*, 123 Tenn. 409, 131 S.W. 972. And see *Hall v Cook County*, 359 Ill. 528, 195 N.E. 54; *Crescent Mfg. Co. v S. Carolina Tax. Comm.*, 129 S.C. 480, 124 S.E. 761. Also see *Bradley Supply Co. v Ames*, 359 Ill. 162, 194 N.E. 272, that "strict construction" is not the exact converse of "liberal construction". And note *People ex rel Nash v Chicago, etc., Ry. Co.*, 359 Ill. 435, 194 N.E. 560, that statutes relating to the levy and collection of taxes will be given a reasonable and common sense meaning to avoid making it difficult or impossible for taxes to be legally levied and collected. Also see *Hartland v Damon's Estate*, 103 Vt. 519, 156 Atl. 518: "A law for the assessment and collection of taxes is to be construed with the utmost liberality. But in order to be subjected to a tax, the property must be such as is ordinarily included in the description given in the statute, and not such as can be brought within it by a process of reasoning only or by a strained construction because the legislature must be presumed to be fairly able to describe such property as it desires to tax without resorting to a strained construction or a course of fine reasoning." That the legal machinery set up by the state for the collection of taxes is favored by the courts, see *Colby v Himes*, 171 Wash. 83, 17 Pac. (2) 606. Also see § 259, *infra*.

¹⁴² *Crooks v Harrelson*, 282 U.S. 55, 51 S.Ct. 49, 75 L.Ed. 1, *Pioneer Express Co. v Riley*, 208 Calif. 677, 284 Pac. 663; *Hayes v Commissioner*, 261 Mass. 134, 158 N.E. 539; *People ex rel Studebaker Corp. v Gilchrist*, 244 N.Y. 114, 155 N.E. 68; *Boggs v Crenshaw*, 157 Tenn. 261, 7 S.W. (2) 994; *State v San Patricio Canning Co. (Tex. Civ. Ap.)* 17 S.W. (2) 160; *Sussex County v Jarratt*, 120 Va. 672, 106 S.E. 384.

¹⁴³ *Fraser v Nauts*, 8 Fed. (2) 106; *State v Beardsley*, 94 Fla. 109, 94 So. 660; *Caldwell v State*, 115 Ohio 458, 154 N.E. 792; *In re Easby's Estate*, 285 Pa. 60, 131 Atl. 652; *State v McLemore*, 155 Tenn. 59, 290 S.W. 386; *Doran v Crenshaw (Tenn.)* 61 S.W. (2) 469.

¹⁴⁴ *Hellman v Hellman*, 18 Fed. (2) 239, *aff.* 276 U.S. 233, 72 L.Ed. 544, 56 A.L.R. 379, 48 S.Ct. 244; *Farmers' Loan & Trust Co. v State*, 280 U.S. 204, 74 L.Ed. 371; *Guaranty Trust Co. v State*, 36 Ohio Ap. 45; *In re Paul's Estate*, 303 Pa. 330, 154 Atl. 503; *Crescent Mfg. Co. v Tax. Commission*, 128 S.C. 14, 121 S.E. 478; *Western Pub. Service Co. v Meharg*, 116 Tex. 193, 292 S.W. 168.

avored.¹⁴⁵ In fact, in construing a statute, the court should study it as a whole,¹⁴⁶ and even if it resorts to a "reasonable" or a liberal construction, care should be taken not to defeat the intention of the legislature.¹⁴⁷ Perhaps, in only two instances should a tax or revenue law be given a liberal construction in favor of the taxing power, or in favor of the government; first, where an exemption is claimed by virtue of the statute's provisions, and second, where the revenue or tax law imposes a tariff on imports.

§ 258. **Exemption from Taxation, Tariff Acts, and Laws to Prevent Fraud on the Revenue.**—Provisions providing for an exemption may be properly construed strictly against the person who makes the claim of an exemption.¹⁴⁸ In other words, before an exemption can be recognized, the person or property claimed to be exempt must come clearly within the language apparently granting the exemption.¹⁴⁹

The reason for requiring a strict construction of statutes in favor of the state where a person claims immunity from the common burden of taxation, has been ably stated by Mr. Justice Brewer, as appears from the quotation from his opinion, in *Stahl v The Educa-*

¹⁴⁵ *Mendoza v Taylor*, 272 N.Y. 275, 5 N.E. (2) 818; *Britt v Cook*, 157 Tenn. 54, 6 S.W. (2) 322.

¹⁴⁶ *People ex rel Palmer v National L. Ins. Co.*, 367 Ill. 35, 10 N.E. (2) 398. Also see *Abilene v State (Tex.)* 113 S.W. (2) 631.

¹⁴⁷ *State v Hallenberg-Wagner Motor Co. (Mo.)* 108 S.W. (2) 398. Also see *In re Sweik's Estate (Wash.)* 91 Pac. (2) 657, that a statute should not be so liberally construed as to produce an unreasonable result. And note *Palmer v State Board of Assessors (Iowa)* 283 N.W. 415, where an income tax statute defining gross income was held unambiguous and to include rent received by a resident from realty outside the state.

¹⁴⁸ *Berryman v Whitman College*, 222 U.S. 334, 32 S.Ct. 147, 56 L.Ed. 424; *Yale University v New Haven*, 71 Conn. 316, 42 Atl. 87; *Northwestern University v People*, 80 Ill. 333, rev. on another point, 90 U.S. 309, 25 L.Ed. 387; *St. Paul's Church v Concord*, 75 N.H. 420, 75 Atl. 531; *New York Life Ins. Co. v Oklahoma County*, 155 Okla. 247, 9 Pac. (2) 936, 82 A.L.R. 1425; *Knoxville, etc., R. Co. v Harris*, 99 Tenn. 684, 43 S.W. 115; *Ritchie v Green Bay*, 215 Wis. 433, 254 N.W. 113, 95 A.L.R. 1081. Also see the note in 62 A.L.R. 330. Also note *Miethe v Pierce County (Wash.)*, that assessment statutes should be liberally construed so that property justly assessable will not escape through technicalities.

¹⁴⁹ *In re Walker*, 200 Ill. 566, 66 N.E. 144, *Southern Pac. R. Co. v State*, 34 N.M. 479, 234 Pac. 117. And see *Young Men's Christian Assoc. v Douglas County*, 60 Neb. 642, 83 N.W. 924, 52 L.R.A. 123.

tional Association of the Methodist Church (54 Kan. 542, 38 Pac. 796):

"All property receives protection from the state. Every man is secured in the enjoyments of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is co-extensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless, it is an exception; and they who claim under an exception must show themselves within its terms."

Moreover, exemption laws are in derogation of equal rights, and this is an equally important reason for construing them strictly.¹⁵⁰ And a third reason appears from the court's language in *Bank of Commerce v Tennessee* (161 U.S. 134, 145, 16 S.Ct. 456, 40 L.Ed. 645):

"Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded on plain language. There must be no doubt or ambiguity used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implications will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power."

With reference to tariff acts, the second type of tax law sometimes subjected to a liberal construction in favor of the government, the rule would seem to be that they should always be construed so

¹⁵⁰ "Exemptions from taxation are regarded not only as in derogation of sovereign authority, but of common right as well. They must be strictly construed, and not extended beyond the express requirements of the language used, not only as to the meaning of statutes granting exemptions, but as to the power of the legislature to enact them." *Jones v Williams*, 121 Tex. 94, 45 S.W. (2) 130, 79 A.L.R. 983. Also see *Pawnee County v Adams*, 144 Kan. 787, 62 Pac. (2) 844.

as to most effectively carry out the intention of the legislature,¹⁵¹ although some of the earlier cases subjected such acts to a construction favoring the taxpayer.¹⁵² There is, however, an obvious difference where the tax is imposed by the government upon property coming into this country, especially where the importer is not an American citizen, and in imposing the tax on property already within the country. Against this, however, may be urged the objection that a further barrier to free commerce—or for that matter to commerce generally—between the nations of the world, is raised when the government subjects the merchandise covered by the tariff act to a construction favoring the imposition of the tax.

One other possible instance exists in which a tax law may be liberally construed. If the law is designed to prevent fraud upon the revenue, even though it is a penal act, some decisions favor a liberal construction.¹⁵³ Such a statute, however, is more properly a statute against fraud rather than a taxing statute, and for this reason properly subject to a liberal construction in the government's favor.¹⁵⁴

§ 259. The Liberal Construction of Tax and Revenue Acts.—

In the preceding section we have stated that in, at least, two instances tax or revenue acts have been subjected to a liberal construction in favor of the state—where an exemption from the tax is claimed, and where a tariff on imports is involved. We have also stated that it is possible to note a trend toward the liberal construction of tax statutes generally. The case of *Kimball v Potter* ([N.H.] 196 Atl. 272) seems to be a representative case. There a

¹⁵¹ *Rankin v Hoyt* (U.S.) 4 How. 327, 11 L.Ed. 996; *Taylor v U.S.*, (U.S.) 3 How. 197, 11 L.Ed. 559. But where there is any doubt whether an article is subject to the tariff duty, it must be resolved in favor of the importer. *Benzinger v U.S.*, 192 U.S. 38, 24 S.Ct. 189, 48 L.Ed. 331; *American Net & Twine Co. v Worthington*, 141 U.S. 468, 12 S.Ct. 55, 35 L.Ed. 821. Also see note 154, *infra*.

¹⁵² *U.S. v Wigglesworth*, Fed. Cas. No. 16,690. To same effect, see *Rice v U.S.*, 53 Fed. 910, 4 C.C.A. 104, a later case.

¹⁵³ See note 132, *supra*.

¹⁵⁴ *Huntington v Attrill*, 146 U.S. 657. "There may and doubtless should be a distinction taken in the construction of those provisions of revenue laws which point out the subjects to be taxed, and indicate the time, circumstances, and manner of assessment and collection, and those which impose penalties for obstructions and evasions." *Cooley, Taxation*, 271.

statute provided that property passing by will, inheritance, "or by deed, grant, bargain, sale or gift, made in contemplation of death, or made or intended to take effect in possession or enjoyment at or after death of the grantor or donor, to any person, absolutely or in trust," should be taxable, with certain enumerated exceptions. The defendant argued that the transfer involved took effect in possession and enjoyment when the trust property was delivered to the trustees pursuant to the instrument of trust; that such delivery took place in the intestate's life time, so that the gift was not taxable. The trust instrument provided that the defendant was to have the income and also the principal so far as was needed to take care of him, and at his death was to end, and the trust estate go to two nephews. The court, however, indicating a leaning toward a liberal construction, said:

"The argument commands little respect. The view that the statutes imposing taxes are, as a matter of course, to be strictly construed, does not have judicial sanction in this jurisdiction. The usual test of statutory construction, to declare what the legislature has meant by the language it has used, will be found to have been employed, it is believed, in all cases where statutes providing for taxation have been interpreted and was expressly accepted in (a) recent case. The policy of the state requires the taxation of property, as a general rule. If the literal meaning of particular words is inconsistent with the general purpose, there is grave reason to doubt whether the literal sense is the sense intended by the legislature."

This same attitude was also adhered to in the relatively early case of *Cornwall v Todd* (38 Conn. 443), where the statutory provision that "whenever a district shall impose a tax, the same shall be levied on all the real estate situated therein, and upon the rolls and other ratable estate, except real estate situated without the limits of such district, of those persons who are residents therein at the time of laying such tax", was involved. In this case, the executor of the will of a deceased person made and returned to the assessors of the town a list of the taxable property of the estate, not in his own name as trustee, but in the name of the deceased's estate. The deceased at the time of his death resided in, and the real estate was situated in a tax district different from that in which the executor resided. Consequently, he sought to restrain the collection of the tax on certain personal property by the district wherein the deceased had resided, on the ground that it was not the property of

any person resident therein. The court, however, in refusing to restrain the collection of the tax, stated:

"This objection assumes that the statute is to be strictly construed. But we do not think that the doctrine of strict construction should apply to it. Statutes relating to taxes are not penal statutes, nor are they in derogation of natural rights. Although taxes are regarded by many as burdens, and many look upon them as money arbitrarily and unjustly extorted from them by government, and hence justify themselves and quiet their consciences in resorting to questionable means for the purpose of avoiding taxation, yet in point of fact no money paid returns so good and valuable a consideration as money paid for taxes laid for legitimate purposes. They are just as essential and important as government itself; for without them in some form government could not exist. The small pittance we thus pay is the price we pay for the preservation of all our property and the protection of all our rights. But there is not only a necessity for taxation, but it is eminently just and equitable that it should be as nearly equal as possible. Hence, it is the policy of the law to require all property, except such as is specially exempted, to bear its proportion of the public burdens. . . . In construing statutes relating to taxes, therefore, we ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the legislature, rather than to defeat that intention by a too strict adherence to the letter."

A similar view was taken by the court in *State v Taylor* (35 N.J.L. 184):

"In laying the burden of taxation upon the citizens of the state, while it must be the object of every just system to equalize this charge by a fair apportionment and levy upon the property of all, it is equally the duty of the courts to see that no one, by mere technicalities which do not affect his substantial rights, shall escape his fair proportion. A liberal construction must therefore be given to all tax laws for public purposes, not only that the offices of government may not be hindered, but also that the rights of all taxpayers may be equally preserved."

Perhaps after one analyzes the cases which subject statutes imposing taxes to a liberal construction, further justification for taking this judicial attitude may be found in the fact that the citizen generally urges a strict construction in order to escape liability from the tax—in a broad sense, an exemption. If this is so, then the same reasons exist for subjecting the tax statute to a liberal construction in favor of the state as are set forth for giving the statute

a liberal construction where the taxpayer seeks an exemption from the law.

If the rule of strict construction can be effectively criticized, the same is equally true with the rule of liberal construction. In fact, Judge Cooley has done so.

“There must surely be a just and safe medium between a view of the revenue laws which treats them as harsh enactments to be circumvented and defeated if possible, and a view under which they acquire an expansive quality in the hands of the court, and may be made to reach out and bring within their grasp, and under the discipline of their severe provisions, subjects and cases which it is only conjectured may have been within their intent. Revenue laws are not to be construed from the standpoint of the taxpayer alone, nor of the government alone. Construction is not to assume either that the taxpayer, who raises the question of his legal liability under the laws, is necessarily seeking to avoid a duty to the state which protects him, nor, on the other hand, that the government, in demanding its dues, is a tyrant which, while too powerful to be resisted, may justifiably be obstructed and defeated by any subtle device or ingenious sophism whatsoever. There is no legal presumption either that the citizen will, if possible, evade his duties, or, on the other hand, that the government will exact unjustly or beyond its needs. All construction, therefore, which assumes either the one or the other, is likely to be mischievous and to take one-sided views, not only of the laws, but of personal and official conduct.”¹⁵⁵

After all, it cannot be denied that the power to tax is, or can be a destructive power. It occupies with reference to property, a position similar to, if not analogous to that held by the power of the state to enact penal legislation whereby personal rights are, or may be, affected. Often property and personal rights are so interlocked that they are practically inseparable, so that any interference with the one, also interferes with the other. Besides that, the right to own property may be as essential to human welfare as are the numerous strictly personal rights. As with personal rights, certain property rights may be beyond the power of the government,¹⁵⁶ and grave danger would exist, should the government be allowed, by the exercise of the power to tax, to encroach upon them. To a limited degree, the rule of strict construction operates as a potential safeguard.

¹⁵⁵ Cooley, *Taxation*, p. 272.

¹⁵⁶ *Citizens' Saving & Loan Ass'n v Topeka* (U.S.), 22 L.Ed. 455.

§ 260. **Private, Special or Local Laws.**—Private laws are generally subject to the same rules of construction as are applied to public laws,¹⁵⁷ but it should be noted that a law of this type, which is not enacted for the general public good but for the benefit of an individual or a corporation, should receive a strict construction.¹⁵⁸ It should not be construed to grant rights, unless the language explicitly does so, or unless such a grant is required by necessary implication.¹⁵⁹ Similarly, a special or local law, must be given strict construction.¹⁶⁰ Their territorial scope,¹⁶¹ as well as the powers which they grant,¹⁶² cannot be extended or enlarged beyond the clear meaning of the language used by the legislature.¹⁶³

There certainly seems to be no real objection to the principle which subjects private, special and local laws to a strict construction. While frequently such laws are secured at the instance of particular persons for their own benefit, and this fact, of course, constitutes an important reason for applying the rule of strict construction,¹⁶⁴ yet the more important reason for construing such laws strictly will be found in their tendency to grant special rights or favors to certain individuals and communities. Such laws partake considerably of the nature of statutes in derogation of common

¹⁵⁷ *Bartless v Morris*, 9 Port. (Ala.) 266. Also see *supra* § 246, Statutes in Derogation of Common Right.

¹⁵⁸ *Harrison v Town of California*, 215 Ky. 349, 285 S.W. 703. "Special or local statutes are usually passed at the instance of parties interested, and for the benefit of particular persons rather than for the general welfare, and are therefore to be construed strictly, both as to the extent of the territory in which they operate, and also as to the powers granted by them." *Powers v School Board*, 148 Va. 661, 139 S.E. 362, 364.

¹⁵⁹ *Hood v Dighton*, 3 Mass. 263.

¹⁶⁰ *Harrison v Town of California*, 215 Ky. 349, 285 S.W. 703; *People ex rel. Lown v Cook*, 142 N.Y.S. 692, 158 Ap.Div. 74; *Orinoco Supply Co. v Masonic & Eastern Star Home*, 163 N.C. 513, 79 S.E. 964; *Powers v County School Board*, 148 Va. 661, 139 S.E. 262. But there should be no distortion of the language. *Aurora etc. R. Co. v Lawrenceburgh*, 56 Ind. 80.

¹⁶¹ *State v Parker*, 57 N.J.L. 360; *Powers v County School Board*, 148 Va. 661, 139 S.E. 262.

¹⁶² *Harrison v Town of California*, 215 Ky. 349, 285 S.W. 703; *Powers v County School Board*, 148 Va. 661, 139 S.E. 262; *Northern Trust Co. v Snyder*, 113 Wis. 516, 89 N.W. 460.

¹⁶³ See *Harrison v Town of California*, 215 Ky. 349, 285 S.W. 703.

¹⁶⁴ *Powers v School Board*, 148 Va. 661, 139 S.E. 362.

right.¹⁶⁵ Consequently, such laws should be confined within as limited a scope as their language fairly and reasonably permits. For it must be assumed that the lawmakers did not intend to grant any special benefits beyond those clearly expressed; that their intention was to restrict the meaning of the language used as closely as possible; and that unless clearly indicated to the contrary, every legislative act will be general in its operation.

After all, the legislature represents the people at large and its true purpose is to enact legislation applicable to all persons in all parts of the state similarly situated. Special, local and private laws constitute exceptions to this. As exceptions, they are logically properly subjected to a strict construction.¹⁶⁶

¹⁶⁵ For treatment of statutes in derogation of common right, see § 246. *supra*.

¹⁶⁶ Compare with exceptions from general tax statutes, § 258, *supra*.

CHAPTER XXIV

MANDATORY AND DIRECTORY OR PERMISSIVE STATUTES

- § 261. In General.
- § 262. Mandatory and Directory or Permissive Words.
- § 263. Affirmative, Negative, Prohibitory and Exclusive Words.
- § 264. Statutes Conferring and Regulating Rights, Remedies, Privileges and Immunities, etc.
- § 265. Reason for Mandatory Construction of Statutes Conferring and Regulating New Rights, etc.
- § 266. Statutes Pertaining to Official Action.
- § 267. Statutes Relating to Judicial Action.
- § 268. Statutes Pertaining to Pleading and Practice.
- § 269. Time for Performance of Official Duties.
- § 270. Miscellaneous Statutes—Taxation, Bonds, Licenses, Elections, etc.
- § 271. Miscellaneous Implied Exceptions from the Requirements of Mandatory Statutes, In General.
- § 272. Waiver of, and Estoppel to Assert Statutory Provisions.
- § 273. Justification for Non-Compliance with Statutory Provisions.
- § 274. Excuses for Non-Compliance with Statutory Provisions.
- § 275. Mens Rea and Specific Intent as a Defense.
- § 276. Wrongful Conduct, Prior Equities, and Laches as Implied Exceptions from Mandatory Provisions.

§ 261. In General.—As we have already stated,¹ a mandatory statute or statutory provision is one which must be followed in order that the proceeding to which it relates may be valid,² and a directory statute or provision is one which needs not be complied with in order that the proceeding to which it pertains may be valid.³ Still, it is not always easy to determine whether a particular statute is mandatory or directory. Perhaps the distinction between these two types of statutes is more clearly pointed out in the relatively

¹ See § 72, *supra*.

² *Kavanaugh v Fash*, 74 Fed. (2) 435; *State ex rel. Ellis v Brown* (Mo.) 33 S.W. (2) 104; *In re Thompson*, 94 Neb. 658, 144 N.W. 243; *People ex rel. Lawton v Snell*, 216 N.Y. 527, 111 N.E. 50; *State v Barnell*, 109 Ohio St. 246, 142 N.E. 611. Also see *DeTienne v Wellsville Fire Brick Co.* (Mo.) 70 S.W. (2) 369. And, of course, a statute may be mandatory in some respects and directory in others. *Hocking Power Co. v Harrison*, 20 Ohio Ap. 135, 153 N.E. 155.

³ *Jones v Steele*, 210 Ky. 205, 275 S.W. 790; *State v Siemens*, 68 Ore. 1, 133 Pac. 1173. Also see cases under note 2, *supra*, and § 72, *supra*.

early case of *Hurford v Omaha* (4 Neb. 336): if the provision involved relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or directs certain actions with a view to the proper, orderly, and prompt conduct of public business, the provision may be regarded as directory, but where it directs acts or proceedings to be done in a certain way and indicates that a compliance with such provisions is essential to the validity of the act or proceeding, or requires some antecedent and prerequisite conditions to exist prior to the exercise of the power, or be performed before certain other powers can be exercised, the statute may be regarded as mandatory.

And, of course, in case of doubt regarding the nature of the statute's requirements, it is necessary for the court to resort to the various rules pertaining to the construction of statutes,⁴ since the determination cannot be made to depend upon mere form alone.⁵ The words of the statute, however, must first be considered,⁶ and then the nature, context, and object of the statute, as well as the consequences of the various constructions.⁷ In other words, the in-

⁴ *North Bloomfield Gravel Min. Co. v U.S.*, 88 Fed. 664, 32 C.C.A. 84, *Phillips v State*, 162 Ark. 541, 258 S.W. 403; *In re Seick*, 46 Calif. Ap. 363, 189 Pac. 314; *Blattner v Dietz*, 311 Ill. 445; *State v Hanson* (Iowa) 231 N.W. 428; *State v Knowles*, 90 Md. 646, 45 Atl. 877, 49 L.R.A. 695; *Upshur v Baltimore City*, 94 Md. 743, 51 Atl. 943; *State ex rel. Ellis v Brown* (Mo.) 33 S.W. (2) 104; *Davis v Board of Education*, 186 N.C. 227, 119 S.E. 372; *Columbus etc. R. Co. v Mowatt*, 35 Ohio St. 284; *State v Barnell*, 109 Ohio St. 246, 142 N.E. 611; *In re Carter*, 3 Ore. 293; *Diebert v Rhodes*, 291 Pa. 550, 140 Atl. 515; *Carbaugh v Sanders*, 13 Pa. Super. 361; *Offield v Davis*, 100 Va. 250, 40 S.E. 910. And see *People v San Bernardino High School Dist.*, 62 Cal. Ap. 67, 216 Pac. 959.

⁵ *Deibert v Rhodes*, 291 Pa. 550, 140 Atl. 515; *Stiner v Powells Hardware Co.* (Tenn.) 75 S.W. (2) 406.

⁶ *Board of Education v State*, 222 Ala. 70, 137 So. 239; *Rutter v White*, 204 Mass. 59, 90 N.E. 401, *Eccles Lumber Co. v Martin*, 31 Utah 241, 87 Pac. 713.

⁷ *John C. Winston v Vaughn*, 11 Fed. Sup. 954; *Townsend v McDonald*, 184 Ark. 273, 42 S.W. (2) 410; *Miller v Aetna L. Ins. Co.* (Mont.) 53 Pac. (2) 704; *Miller v State*, 3 Ohio St. 475. "To announce that a law . . . was not valid because of the omission of words thus immaterial and formal only, would be sacrificing substance to mere form, and declaring that to be mandatory, which the law pronounces to be directory. *McPherson v Leonard*, 29 Md. 377.

tention of the legislature must be ascertained and given effect,⁸ even though mandatory or directory words are thereby given their opposite meanings,⁹ although the court should not depart from the literal meaning of such words, unless the intention of the legislature to give them a different meaning clearly appears.¹⁰

Consequently, in *People v De Renna* (2 N.Y.S. (2) 694, 166 Misc. 582) where the statute provided that a defendant, upon conviction by the jury to life imprisonment, "may be sentenced to life imprisonment" by the court, the ordinarily permissive word "may" was held to be mandatory:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other. This case is applicable to the case at bar because it deals with the question of punishment."

The general rule is also succinctly stated in *People v Sutcliffe* (7 N.Y.S. (2) 431), from which the following excerpt is taken:

"It is a rule of statutory construction that where a statute is framed in terms of command, and there is no indication from the nature or wording of the act or the surrounding circumstances that it is to receive a permissive interpretation, it will be construed as pre-emptory."

Undoubtedly, the strict and liberal construction of statutes is closely related to their mandatory or permissive construction. Just as in the former instance, whether a given "determinate" is to be included or excluded from the statute's operation depends upon the wish of the interpreter, so in the latter instance, whether the failure to obey the requirements of the statute is fatal or not, depends upon the interpreter's conception of the nature of the requirements. In other words, the court will determine whether a particular provi-

⁸ *People v San Bernardino High School Dist.*, 62 Calif. Ap. 67, 216 Pac. 959; *People v Miller*, 314 Ill. 474, 145 N.E. 685; *Board of Education v Litter*, 227 Ky. 493, 13 S.W. (2) 516; *Bass v Board of Trustees*, 235 N.Y.S. 250, 226 Ap.Div. 165; *Burton v McGuire* (Tex. Civ. Ap.) 3 S.W. (2) 576.

⁹ *Fields v U.S.*, 27 Ap. D.C. 433; *Rothschild v N.Y. Life Ins. Co.*, 97 Ill. Ap. 547; *Leighton v Maury*, 76 Va. 865.

¹⁰ *Farmers Development Co. v Rayado Land etc. Co.*, 28 N.M. 357, 213 Pac. 202.

sion must be followed. It will do this, even though the statute on its face is clear, just as it will determine whether an unambiguous statute will include or exclude a given case from its operation if construed strictly or liberally. Both play an important part in the application of a statute—the last step in the interpretative process. Both are used to avoid a strict and literal adherence to the letter and form of a statute in order that the statute may produce no absurd or mischievous results, or to compel a strict and literal adherence to the letter and form of the law so that no absurd or mischievous results will follow. And, of course, the justification for this attitude is found in the maxim that it is presumed that the legislature does not intend to enact a law which will operate absurdly or mischievously. Consequently, in avoiding such results, the court is actually giving effect to the legislative intent.

The same objections can be raised to a mandatory construction as to a strict construction, and to a permissive construction as to a liberal construction. Perhaps the most important objection is that the court may invade the legislative field and actually legislate. If it can decide what shall be the effect of a failure to obey the requirements of a statute, does it not actually determine whether a statute shall be the law in a given case? This objection might be valid if we would assume that the court recognized no limitations upon its power of interpretation. But even in determining whether a provision is mandatory or permissive, the legislative intent controls the court.

It is doubtful whether the absurd and mischievous results which would flow from a denial of the power to the court to determine whether a provision of a statute was mandatory or not, could be avoided without the existence of this power in the court. Legislatures, like individuals, often use mandatory words when they really do not intend to issue a command.

As Lord Penzance said in *Howard v Bodington* (2 P.D. 203), with reference to the problem of determining when a statute is mandatory and when it is directory, you cannot glean a great deal that is very decisive from a perusal of the cases. "They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell:

"No universal rule can be laid down. . . . I believe, as far as any rule is concerned, you cannot safely go further than

that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

In other words, most statutes of a comprehensive and detailed nature are likely to contain many requirements which pertain to minor or non-essential particulars. The basic test by which to determine whether the requirement is essential or not, is to consider the consequences of the failure to follow the statute. In this way, the importance of the requirement will be revealed. If the requirement is revealed to be important, it may logically be assumed that the legislature intended that it be met; if found to be unimportant, that it need not be met. Such was the case in *People v Smith* (368 Ill. 328, 14 N.E. (2) 820) :

"In determining how far a statute is mandatory, the legislative intent must govern. We must consider the importance of the punctilious observance of the provision in question with reference to the object the legislature had in view. All laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview, but it does not follow that every slight departure therefrom shall taint the whole proceeding with a fatal blemish. The omission of the signer of the petition (referendum) to write in the year and month when they were already in the petition, did not render the petition invalid."

After all, if every minor and unessential detail of a statute were considered imperative, almost every act performed in accord therewith would be invalid or ineffective, whether the act was performed by individuals or by public officers. The confusion and impotency which would take place would in all probability break down our legal system. In order for law to be administered efficiently, effectively and expeditiously, the distinction between essential and non-essential requirements must be maintained, either by the courts or by express legislative enactment. The legislature could expressly provide that the failure to meet the mandates of a statute would or would not, as the case might be, invalidate the act performed under such statute. This, of course, would remove the problem of determining what provisions were mandatory and what provision were not, from the courts.

§ 262. **Mandatory and Directory or Permissive Words.**—Ordinarily the words “shall”¹¹ and “must”¹² are mandatory, and the word “may”¹³ is directory, although they are often used interchangeably in legislation.¹⁴ This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legisla-

¹¹ *Montgomery v Henry*, 144 Ala. 629, 39 So. 507; *Fowler v Pirkins*, 77 Ill. 271; *Morrison v State*, 181 Ind. 544, 105 N.E. 113; *State v Hanson* (Iowa) 231 N.W. 428; *Town of Milton v Cook*, 244 Mass. 93, 138 N.E. 489; *State ex rel. Carpenter v City of St. Louis*, 318 Mo. 870, 2 S.W. (2) 713; *Davis v Board of Education*, 186 N.C. 227, 119 S.E. 372; *State v Reeves*, 112 S.C. 383, 99 S.E. 841; *Home Tel. Co. v Nashville*, 118 Tenn. 1, 101 S.W. 770; *Moyer v Kelley* (Tex.) 93 S.W. (2) 502; *Baer v Gore*, 79 W.Va. 50, 90 S.E. 530; *Hazeltine v Simpson*, 61 Wis. 427, 21 N.W. 299. The use of the word “shall”, although not controlling, is significant as indicating the intent that the statute shall be mandatory. *Escal v Zerbst*, 255 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566.

¹² *Ex parte Smith*, 152 Calif. 566, 93 Pac. 191; *People v Thomas*, 66 N.Y.S. 191, 32 Misc. 170; *State v Barnell*, 109 Ohio St. 246, 142 N.E. 611; *Mitchell v Hancock* (Tex. Civ. Ap.) 196 S.W. 694. The use of the word “must” does not *ipso facto* make the statute mandatory. *Skelly Estate Co. v San Francisco* (Calif.) 69 Pac. (2) 171. As to the interpretation of the word “may” and “must”, see note in 5 L.R.A. (N.S.) 340.

¹³ *Fugitt v Lake Erie etc. R. Co.*, 287 Fed. 556; *Knight v Fisher*, 15 Colo. 176, 25 Pac. 78; *Dawson v Black*, 148 Ill. 484, 36 N.E. 413; *Morrison v State*, 181 Ind. 544, 105 N.E. 113; *Queeney v Higgins*, 136 Iowa 573, 114 N.W. 51; *Gleason v Sedgwick County*, 92 Kan. 632, 141 Pac. 584; *Ocean Accident & Guarantee Corp. v Milford Bank*, 236 Ky. 457, 23 S.W. (2) 312; *Breen v Kehoe*, 142 Mich. 58, 105 N.W. 28; *State ex rel. Coleman v Blair*, 245 Mo. 680, 151 S.W. 148; *State v Amsberry*, 104 Neb. 273, 177 N.W. 179, 178 N.W. 822; *In re Goddard*, 94 N.Y. 544; *Simpson v Winegar*, 122 Ore. 297, 258 Pac. 562; *McMullin v Commonwealth Title Ins. etc. Co.*, 261 Pa. 574, 104 Atl. 760; *Weber v Rogan*, 94 Tex. 62, 54 S.W. 1016; *Harrison v Wissler*, 98 Va. 597, 36 S.E. 982; *Carson v Phoenix Ins. Co.*, 41 W.Va. 136, 23 S.E. 552. This is especially so where the word “may” is followed by “shall”. *U.S. v Ranes*, 48 Fed. (2) 582.

¹⁴ *Manufacturers' Exhibition Bldg. Co. v Landay*, 219 Ill. 168, 76 N.E. 146; *Ackerman v Hendricks* (Iowa) 90 N.W. 522; *State v Barnell*, 109 Ohio St. 246, 142 N.E. 611; *Thorson v Weimer*, 59 N.D. 457, 230 N.W. 596; *Kansas City v Case Threshing Machine Co.*, 337 Mo. 913, 87 S.W. (2) 195.

ture.¹⁵ Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning.¹⁶ If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature,¹⁷ then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa.¹⁸ In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words "shall"¹⁹ and

¹⁵ And, of course, this means the use of the general rules of construction. *Manufacturers' Exhibition Bldg. Co. v Landay*, 219 Ill. 168, 76 N.E. 146; *Morrison v State*, 181 Ind. 544, 105 N.E. 113; *Downing v Oskaloosa*, 86 Iowa 352, 53 N.W. 256; *Kansas Pac. R. Co. v Reynolds*, 8 Kan. 623; *State v Talty*, 166 Mo. 529, 66 S.W. 361; *Western Travelers' Acc. Assoc. v Taylor*, 62 Neb. 783, 87 N.W. 950; *Wuesthoff v Germania Life Ins. Co.*, 107 N.Y. 580, 14 N.E. 811; *Moore v Waters*, 148 N.C. 326, 146 S.E. 92; *National Surety Co. v Campbell*, 108 Wash. 596, 185 Pac. 602; *Ex parte Doyle*, 62 W.Va. 280, 57 S.E. 824. Even the legislative history has been considered—whether "shall" was inserted by amendment for "may"; *Rockdale County Bd. v Gresham*, 21 Ga. Ap. 440, 94 S.E. 641; *State v Board of Comrs.*, 94 Ohio St. 296, 113 N.E. 831, or vice versa; *Goodchild & Partners v Ready Tool Co.*, 100 Conn. 378, 124 Atl. 38; *State v Board of Education*, 105 Ohio St. 438, 138 N.E. 865; *Dillingham v Mayor, etc.*, 75 S.C. 549, 56 S.E. 381. Also see *Rea v Cook*, 217 Mass. 427, 105 N.E. 618.

¹⁶ *North Bloomfield Gravel Min. Co. v U.S.*, 88 Fed. 664, 32 C.C.A. 84; *Downing v City of Oskaloosa*, 86 Iowa 352, 53 N.W. 256; *Medbury v Swan*, 46 N.Y. 200; *Hempstead v Lawrence*, 122 N.Y. S. 1037, 138 Ap. Div. 473.

¹⁷ See cases under note 15, *ibid*.

¹⁸ *Fields v U.S.*, 27 App. D.C. 433; *Boyer v Onion*, 108 Ill. Ap. 612; *State v Barry*, 14 N.D. 316, 103 N.W. 637; *Leighton v Maury*, 76 Va. 865.

¹⁹ *U.S. v Boyd*, 24 Fed. 692; *People v San Bernardino High School Dist.*, 62 Calif. Ap. 67, 216 Pac. 959; *Manufacturers' Exhibition Building Co. v Landay*, 219 Ill. 168, 76 N.E. 146; *Morrison v State*, 181 Ind. 544, 105 N.E. 113; *Sisson v Board of Supervisors*, 128 Iowa 442, 104 N.W. 454, 70 L.R.A. 440; *Seneca First Nat. Bank v Lyman*, 59 Kan. 410, 53 Pac. 125; *Suburban Light, etc., Co. v Boston*, 153 Mass. 200, 26 N.E. 447; *State ex rel. v Knights of Father Mathews*, 164 Mo. Ap. 361, 144 S.W. 896; *State v Douglass County*, 27 Nev. 469, 77 Pac. 984; *In re Toll Bridge*, 207 N.Y. 582, 101 N.E. 462; *State v West*, 3 Ohio St. 509; *State v Hecker*, 109 Ore. 520, 221 Pac. 808; *Becker v Lebanon*, 188 Pa. 484, 41 Atl. 612; *Sherod v Hughes*, 110 Tenn. 311, 75 S.W. 717; *Spaulding & Kimball v Aetna Chemical Co.*, 98 Vt. 169, 126 Atl. 588; *Pettus v Hendricks*, 113 Va. 326, 74 S.E. 191; *Clancy v McElroy*, 30 Wash. 567, 70 Pac. 1095.

"must"²⁰ to be directory, they should be given that meaning.²¹ Similarly, under the same circumstances, the word "may"²² should be given a mandatory meaning, and especially where the statute concerns the rights and interests of the public, or where third persons have a claim *de jure* that a power shall be exercised,²³ or when-

²⁰ *Pleasant Grove Union School Dist. v Algeo*, 61 Calif. Ap. 660, 215 Pac. 726; *People v Bailey*, 171 N.Y.S. 394, 103 Misc. 366; *Matter of State*, 207 N.Y. 582, 101 N.E. 462.

²¹ They should be so construed especially where such a construction will prevent the statute from being unconstitutional. *Denver v Londoner*, 33 Colo. 104, 80 Pac. 117; *Bemis v Guirl Drainage Co.*, 182 Ind. 36, 105 N.E. 496; *People ex rel. Kesselbaum v Fox*, 129 N.Y.S. 657, 144 Ap. Div. 616. And illustrative of the text, see *Swift v Registrars of Quincy*, 281 Mass. 271, 183 N.E. 730, where the statute provided that no ballot shall be counted unless cancelled, and the provision was held to be simply directory, so that where the failure to cancel was due solely to the failure of a mechanical device, the ballot should nevertheless be counted.

²² *U.S. ex rel. Stayton v Paschall*, 9 Fed. (2) 109; *In re Seider*, 163 Fed. 138; *Root v O'Brien*, 164 Ark. 156, 261 S.W. 291; *Hoppe v. Hoppe* (Calif.) 36 Pac. 389, *Rorkwell v Clark*, 44 Conn. 534; *Young v Carey*, 184 Ill. 613, 56 N.E. 960; *State v Goodsell*, 136 Iowa 445, 113 N.W. 826; *Havens v Pope*, 10 Kan. Ap. 299, 62 Pac. 538; *Rich v Board of Canvassers*, 100 Mich. 453, 59 N.W. 181; *Henry v State*, 87 Miss. 1, 39 So. 1; *Hilfillan v Hobart*, 35 Minn. 185, 28 N.W. 222; *Canada v Daniel*, 175 Mo. Ap. 55, 157 S.W. 1032; *Beadle v Sanders*, 104 Neb. 427, 177 N.W. 789; *Compton v Calvert*, 77 N.J.L. 358, 72 Atl. 29; *Watson v Lamphier*, 172 N.Y.S. 247; *Falls of Neuse Mfg. Co. v Brower*, 105 N.C. 440, 11 S.E. 313; *Smith v Brown*, 24 Okla. 433, 103 Pac. 762; *Hubner v Hubner*, 67 Ore. 557, 136 Pac. 667; *Mills v Fortune*, 14 N.D. 460, 105 N.W. 235; *Gamble v Paine*, 141 Tenn. 548, 213 S.W. 419; *McRuffin v State*, 91 Tex. Cr. 569, 240 S.W. 309; *Brush v Watson*, 81 Vt. 43, 69 Atl. 141; *Radford v Fowlkes*, 85 Va. 820, 8 S.E. 817; *State v Union Sav. Bank*, 92 Wash. 484, 159 Pac. 761; *Butcher v Kunst*, 65 W.Va. 384, 64 S.E. 967; *Fleming v City of Appleton*, 55 Wis. 90.

²³ *Birdstrong v Brooks*, 7 Ga. 88. Also see *Hairgrove v City of Jacksonville*, 366 Ill. 163, 8 N.E. (2) 187; *Downing v Oskaloosa*, 86 Iowa 352, 53 N.W. 256; *Gleason v Sedgwick County*, 92 Kan. 632, 141 Pac. 584; *Hazelip v Fiscal Court*, 228 Ky. 80, 14 S.W. (2) 398; *Common. v Mekelburg*, 235 Mass. 383, 126 N.E. 790; *State v King*, 136 Mo. 309, 36 S.W. 681, 38 S.W. 80; *People v Sisson*, 222 N.Y. 387, 118 N.E. 789; *Curry v City of Portage*, 195 Wis. 35, 217 N.W. 705. As a result of this rule, the court properly refused to construe the word "may" as "shall" or "must", in a statute which provided that an official "may be reimbursed by the city when proceeded against in his official capacity" where the officer had been unsuccessfully proceeded against in an effort to remove him from office, so as to prevent the recovery of expenses incurred by him in his own defense. *Curry v City of Portage*, 195 Wis. 35, 217 N.W. 705. The matter involved was of a political nature. For further treatment of this rule, see § 266, *infra*.

ever something is directed to be done for the sake of justice or the public good,²⁴ or is necessary to sustain the statute's constitutionality.²⁵

Yet the construction of mandatory words as directory and directory words as mandatory should not be lightly adopted.²⁶ The opposite meaning should be unequivocally evidenced before it is accepted as the true meaning;²⁷ otherwise, there is considerable danger that the legislative intent will be wholly or partially defeated.

While the words "shall", "must" and "may" are the ones generally involved in determining whether a statute is mandatory or merely permissive, there are other words and expressions which create the same problem, and to which the same principles are equally applicable. For instance, chief among these less widely used words or expressions, are "shall have the power",²⁸ "shall be lawful",²⁹ "shall be the duty",³⁰ "may and shall" or "shall and

²⁴ *Smith v City Comm.*, 281 Mich. 235, 274 N.W. 776; *Kansas City v Case Threshing Mach. Co. (Mo.)* 87 S.W. (2) 195, "When a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'. *Rex & Regina v Barlow (Eng.)* 2 Salk. 609, and quoted in *Rock Island County Sup'rs v U.S. ex rel State Bank (U.S.)* 4 Wall 435, 18 L.Ed. 419. This was true in *Coneculi County v Carter*, 220 Ala. 668, 126 So. 132, where the statute provided that the commissioners may take into consideration the enhanced value to the remaining land of an owner whose land was taken for highway purposes."

²⁵ *Denver v Londoner*, 33 Colo. 104, 80 Pac. 117.

²⁶ *Sanford Realty Co. v Knoxville (Tenn.)* 110 S.W. (2) 325.

²⁷ *Wahl v Waters (Calif.)* 70 Pac. (2) 945; *Jennings v Suggs (Ga.)* 178 S.E. 282; *DeTienne v Wellsville Brick Co. (Mo.)* 70 S.W. (2) 369. Also see *Train v Sisti*, 262 N.Y.S. 167, 146 Misc. 362, that the power to adopt the opposite meaning should be exercised with "great caution".

²⁸ *George v Board of Revenue*, 207 Ala. 227, 92 So. 369; *Cummins v Cummins*, 15 Del. 423, 31 Atl. 816 (permissive).

²⁹ *Ex parte Brooks*, 19 Ala. 462; *Ex parte Whittington*, 34 Ark. 394; *Seiple v Elizabeth*, 27 N.J.L. 407; *Clark v City of Elizabeth*, 61 N.J. 565, 40 Atl. 616; *Appollo Borough v Clapper*, 44 Pa. Super 396.

³⁰ *Clark v City of Elizabeth*, 61 N.J.L. 565, 40 Atl. 616; *Apollo Borough v Clapper*, 44 Pa. Super 396. Also see *Doner v Hazen*, 10 Vt. 418.

may",³¹ and the words "authorized"³² and "ought".³³

§ 263. Affirmative, Negative, Prohibitory and Exclusive Words.—Prohibitive or negative words can rarely, if ever, be directory, or, as it has been aptly stated, there is but one way to obey the command "thou shalt not", and that is to completely refrain from doing the forbidden act.³⁴ And this is so, even though the statute provides no penalty for disobedience.³⁵ Accordingly, negative, prohibitory and exclusive words or terms are indicative of the legislative intent that the statute is to be mandatory,³⁶ but their absence does not, of itself conclusively indicate a legislative intention that the statute is permissive, for affirmative words may im-

³¹ *Cooke v Spears*, 2 Calif. 409; *State ex rel Hugg v Camden*, 39 N.J.L. 620. Also see *Stamper v Miller (Eng.)* 26 Reprint, 923, that "shall or may" is permissive, and *State v Knowles*, 90 Md. 646, 45 Atl. 877, 49 L.R.A. 695, that "may and shall" is imperative.

³² *Red Canyon Sheep Co. v Ickes*, 98 Fed. (2) 308; *State v Franklin County*, 84 Kan. 404, 114 Pac. 247 (permissive); *People v Osotego County*, 51 N.Y. 401 (mandatory).

³³ *Life Assn. v St. Louis County Bd.*, 49 Mo. 518; *Jackson v State*, 32 Tex. Cr. 192, 22 S.W. 831.

³⁴ *Gomez v Timon*, 60 Tex. Civ. Ap. 311, 128 S.W. 656. Also see *State v Dunbar*, 39 Idaho 691, 230 Pac. 33; *Starling v Bedford*, 94 Iowa 197; *In re Douglass*, 46 N.Y. 42; *In re McQuiston's Adoption*, 238 Pa. 304, 86 Atl. 205; *Higgins v Gray*, 54 S.D. 488, 223 N.W. 711; *State v Stumpf*, 23 Wis. 630. And note *State v Thompson*, 21 N.D. 426, 131 N.W. 231. But see *Clark v Robinson*, 88 Ill. 498, that the statute was directory.

³⁵ *Cotton v Brien*, 6 Rob. (La.) 115. The imposition of a penalty, however, would seem clearly to render the statute prohibitive and hence mandatory. *Skelton v Bliss*, 7 Ind. 77; *Bacon v Lee*, 4 Iowa 490; *In re Cramer's Election*, 248 Pa. 208, 93 Atl. 937. Also see *Hudgins v Mooresville School Dist.*, 312 Mo. 1, 278 S.W. 769: "Under a general classification statutes are either mandatory or directory—if mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if they are not done; if directory, their terms are limited to what is required to be done." But the rule is not absolute. See *People ex rel McGroarty v Los Angeles (Calif.)* 50 Pac. (2) 101. "When a penalty is imposed for doing or omitting an act, the act or omission is thereby prohibited and made unlawful; for a statute would not inflict a penalty on what was lawful." Maxwell, *Interpretation of Statutes* (6th Ed.—1920), p. 639-690.

³⁶ See cases under note 34, *supra*.

ply a negative,³⁷ although, of course, their absence is a circumstance to be considered.³⁸ Nevertheless, where affirmative words are used, if a negative is neither expressed or implied, the statute is merely directory.³⁹

“Each statute must be judged by itself as a whole, regard being had, not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract. The statute we are considering, does not, in terms, prohibit the corporation from lending money to its officers, or declare that such contracts shall be void. It is directed to the officers, and by its terms seems intended to furnish rules to regulate the duty of the officers to the corporation and its members. It does not say that the corporation shall not lend, but that the officers shall not borrow. . . . It is designed to forbid officers who are charged with the duty of investing funds of the corporation borrowing from themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policyholders from the dishonesty or self-interest of the officers. It is intended as a shield to the corporation. To construe it as making

³⁷ *H. M. Vestal Co. v Robertson*, 277 Ill. 425, 115 N.E. 629; *Dubuque v Dubuque*, 7 Iowa 262; *Hurford v Omaha*, 4 Neb. 336; *Hardmann v Bowen*, 39 N.Y. 196; *In re Cramer's Election Case*, 248 Pa. 208, 93 Atl. 937. This was the case in *State v Hanson*, 210 Iowa 773, 231 N.W. 428, where it was provided that the county treasurer “shall pay such taxes to the treasurers of the several municipalities only on such order.”

³⁸ *In re McQuiston's Adoption*, 238 Pa. 304, 86 Atl. 205.

³⁹ *Dutchess County Mut. Ins. Co. v Van Wagoner*, 132 N.Y. 398, 30 N.E. 971. And note *In re Bank of Mt. Moriah*, 226 Mo. Ap. 1230, 49 S.W. (2) 275, that a statute which requires certain things to be done, but does not prescribe any results to follow if they are not done, should be held directory. This rule is especially applicable to usurious contracts. *Merrill v McIntire* (Mass.) 13 Gray 157; also to statutes relating to the celebration of marriage contracts. *Meister v Moore*, 96 U.S. 76, 24 L.Ed. 826. But see *Denison v Denison*, 35 Md. 361; *Offield v Davis*, 100 Va. 250, 40 S.E. 910. And where an affirmative direction is followed by a negative or limiting provision, the negative or limiting clause renders the statute mandatory. Thus, the statutory provision that “the voter shall use a pencil to mark his ballot, and no pen, stamp or other instrument than a pencil shall be used for such purpose,” falls within the aforesaid rule. *Higgins v Gray*, 54 S.D. 488, 223 N.W. 711.

the promises of the officers who borrow money in violation of its provisions void, would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporations for whose protection the statute was made. It would require a plain expression of the legislative intention to lead us to such a construction." *Bowditch v New England Mutual Ins. Co.*, 141 Mass. 292, 4 N.E. 798, 55 Am. Rep. 474.

On the other hand, affirmative words may and often are so absolute that they will render the statute mandatory or prohibitory.⁴⁰

"The doctrine was also announced and approved in the case of *Diversy v Smith*, supra, that an affirmative statute introductory of a new law which directs a thing to be done in a certain manner, means that such thing shall not be done in any other manner, even though there be no negative words prohibiting it. That rule is equally applicable in this case . . . which provides that the certificate of complete organization shall be filed for record in the county where the principal office of the corporation is located before the corporation shall commence business, is equivalent to an express prohibition against the authority to do so unless the certificate shall be first filed for record." *H. M. Vestel Co. v Robertson*, 277 Ill. 425, 115 N.E. 629, 630-631.

Nor is it any easier to determine when a statute is exclusive than it is to ascertain when one is mandatory, prohibitive or permissive. As a general rule, however, where a statute creates a duty or an obligation, though it gives no express remedy, the remedy which is by law properly applicable to that obligation follows as an incident, yet whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance.⁴¹

⁴⁰ *Dubuque v Dubuque*, 7 Iowa 276; *Koch v Bridges*, 45 Miss. 247; *In re Van Noort* (N.J. Sup.) 85 Atl. 813. Also see *Horse Creek Conserv. Dist. v Lincoln Land Co.* (Wyo.) 59 Pac. (2) 763.

⁴¹ *Hayes v Mich. Central R. Co.*, 14 U.S. 228, 45 S.Ct. 369, 28 L.Ed. 410; *Batt v Pratt, et al*, 33 Minn. 323, 23 N.W. 237; *Taylor v Lake Shore, etc., R. Co.*, 45 Mich. 74, 7 N.W. 728. For a further treatment of this problem, see *Thayer, Public Wrong and Private Action*, 27 Harv. L.Rev. 317 (1914). Also see § 264, infra, for additional discussion.

§ 264. **Statutes Conferring and Regulating Rights, Remedies, Privileges and Immunities, etc.**—A statute which creates a new right, privilege or immunity, and regulates the manner of its exercise, will be construed as mandatory.⁴² In other words, the right can be exercised only in the manner and within the time⁴³ prescribed.⁴⁴ Similarly, when a statute gives a new right and prescribes a particular remedy for its recovery, such remedy must be strictly pursued; though it is otherwise where a statute gives a right without prescribing a remedy. In the latter case, the common law affords the remedy and any suitable form of action may be adopted.⁴⁵ This

⁴² *Wheaton v Peters*, 8 Pet. (U.S.) 591 (copyright); *Leggate v Clark*, 111 Mass. 308; *Bartlett v O'Donoghue*, 72 Mo. 563; *Graham v Long*, 95 Pa. St. 383. Also see *Juliand v Rathbone*, 39 N.Y. 369; *Bladen v Philadelphia*, 60 Pa. St. 464. The rule announced by the above text was held applicable in *Schaut v School Dist.*, 191 Wis. 104, 210 N.W. 270, in which the statute involved provided that contracts for the transportation of school children must be in writing, so that in the absence of such a contract one who had transported school children could not recover therefor. But note *Bechtel v Board of Suprs. (Iowa)* 251 N.W. 633; *Samuell v Am. Mortg. Corp. (Tex.)* 78 S.W. (2) 1036, that the word "may" is never deemed mandatory for the purpose of creating a private right. Also see *Samuell v American Mortgage Corp. (Tex.)* 108 S.W. (2) 193.

⁴³ *Bryant v Kentucky Lumber Co.*, 144 Ky. 755, 139 S.W. 1089; *Corbett v Bradley*, 7 Nev. 106.

⁴⁴ *Reed v Omnibus R. Co.*, 33 Calif. 212. And see *Ellsworth v Mitchell*, 31 Me. 247: "But it is a rule founded in sound reason, that when a statute gives a new power, and at the same time provides the means of executing it, those, who claim the power, can execute it in no other way."

⁴⁵ *Reed v Omnibus R. Co.*, 33 Calif. 212. "The principle, that the law will furnish a remedy to a party injured by the neglect or non-performance of a duty imposed on an individual by statute, where the statute itself furnishes no remedy, is too familiar and well established to need the support of authorities. If the statute which imposes a new duty also provides a particular remedy, that remedy is usually the only remedy the injured party has." *Town of Brattleboro v Wait*, 44 Vt. 459. Also see *Almy v Harris (N.Y.)* 5 Johns 175. And note the discussions in 29 Harv. L.Rev. 93 (1915) and 33 Harv. L.Rev. 117 (1919); and see *Grant v Slater Mill & Power Co.*, 14 R.I. 380, where a statute gave a public officer the remedy of penal prosecution and a remedy in equity, and the latter remedy was held available to an individual. In *Stevens v Chown (Eng.)* 1 Ch. 894, we find the instances involving remedies divided into three classes: "There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the enacted statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at com-

is equally true with reference to criminal offenses.⁴⁶ Moreover, a statute regulating a pre-existing right or privilege, if negative in form, will also be considered mandatory.⁴⁷ If not negative in form, however, at least, so far as the time of exercise is concerned, the old right need not be exercised within or at the specified time.⁴⁸

§ 265. **Reason for Mandatory Construction of Statutes Conferring and Regulating New Rights, etc.**—It would seem that statutes which confer and regulate new rights, privileges, immunities, and remedies, are entitled to receive a mandatory construction largely because they are in derogation of the common law or of common right. These statutes are generally to be strictly construed, and we stated at the beginning of this chapter that strict construction and mandatory construction are closely related. This is well expressed by the dissenting opinion of Judge Mitchell in *Tvedt v Wheeler* (70 Minn. 161, 72 N. W. 1062):

“As respects the person upon whom the duty involves, it can make no difference whether the duty is one imposed by statute or by the common law, unless the statute imposing the duty itself changes the rule. Statutes are not to be presumed to alter the common law, further than they so declare, expressly or by clear implication. The statute gives no right of action

mon law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt, or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it.”

⁴⁶ *Andover Turnpike Co. v Gould*, 6 Mass. 44; *State v Parker*, 91 N.C. 650. “Where a new penalty is applied for a matter which at common law was an indictable offense, either remedy may be pursued; but where the statute makes the offense, that remedy must be taken which the statute gives.” *Town of Brattleboro v Wait*, 44 Vt. 459. And in some instances, one may be subject to several penalties. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either does not exempt the defendant from prosecution and punishment under the other. A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction and sentence upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.” *Morey v Common.*, 108 Mass. 433.

⁴⁷ *Stayton v Hulings*, 7 Ind. 144.

⁴⁸ *Juliand v Rathbone*, 39 N.Y. 369.

against anyone, except as that right is implied by the imposition of a duty. In the present case the statute imposes a duty, but is entirely silent as to whose duty it is. There is nothing in the language of the act implying or indicating an intention to change the common-law rule. The words 'factories', 'mills', 'workshops', 'storehouses', etc., are not synonymous with buildings constructed and fitted for such purposes. They only become factories, mills, etc., within the meaning of the statute, when used. If a building be constructed and fitted for use as a factory, but is never so used, it would not be a 'factory', while, on the other hand, if it was not constructed for a factory, but was in fact used for that purpose, it would be a "factory", within the meaning of the statute."

This judicial attitude is also revealed in *Thompson v Thompson* (218 U. S. 611, 31 S.Ct. 111, 54 L.Ed. 1180), where the question was involved whether the Married Woman's Act allowed a wife to bring an action to recover damages for an assault and battery upon her person by her husband:

"By this District of Columbia statute the common law was changed, and, in view of the additional rights conferred upon married women in section 1155 and other sections of the code, she is given the right to sue separately for redress of wrongs concerning the same. That this was the purpose of the statute, when attention is given to the very question under consideration is apparent from the consideration of its terms. Married women are authorized to sue separately for 'the recovery, security or protection of their property, and for torts committed against her as fully and freely as if she were unmarried.' That is, the limitation upon her right of action imposed in the requirement of the common law that the husband should join her was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action as against her husband, but to allow the wife, in her own name, to maintain actions of tort which at common law must be brought in the joint names of herself and husband.

"It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention."

The question might be asked: Even though statutes which confer and regulate new rights, privileges and remedies are in derogation of the common law or of common right, is that a sufficient reason for subjecting them to the same type of construction? It might be suggested that many of these statutes are largely, if not purely remedial, so that logically by virtue of that character, they would be entitled to a liberal construction. If the remedial characteristic is the primary nature of the statute, and if it meets the general requirements of those remedial statutes which are usually liberally interpreted, little reason exists for refusing to so interpret them. Yet, frequently the new right or privilege is a radical departure from those already existing. This would appear to be a satisfactory reason for subjecting them to a strict construction, even so far as the statutes enacted regulating their exercise are concerned. Men, to a very large extent, rely upon existing law, and it does not seem out of place to require legislation making any radical or severe alteration therein, to be strictly construed. If any exception thereto is to be permissible, it would be only where the new statute is purely procedural.

§ 266. Statutes Pertaining to Official Action.—As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them, will be construed as directory rather than mandatory,⁴⁹ especially where such regulation pertains to uniformity, order, and convenience,⁵⁰ and neither public nor private rights will be injured or impaired thereby.⁵¹ If the statute is negative in form,⁵² or if nothing is stated regarding the

⁴⁹ *State v Grace*, 98 Ark. 505, 136 S.W. 670; *Gallup v Smith*, 59 Conn. 354, 22 Atl. 334, 12 L.R.A. 353; *Blattner v Dietz*, 311 Ill. 445, 143 N.E. 311; *Wait v Southern Oil Co.*, 209 Ky. 682, 273 S.W. 473; *Uvalde v Burney* (Tex. Civ. Ap.) 145 S.W. 311; *Allen v Lewis*, 26 Wyo. 85, 177 Pac. 433. Also see § 269, *infra*, Time for Performance of Official Duties.

⁵⁰ *Riseley v Rumble*, 81 Ind. Ap. 578, 144 N.E. 568; *Schlaflly v Baumann* (Mo.) 108 S.W. (2) 363; *Hudgins v Mooresville Consol. School Dist.*, 312 Mo. 1, 278 S.W. 769; *Holland v Osgood*, 8 Vt. 276. As is obvious, this rule is especially applicable to statutes defining the duties of administrative officials. *Opgar v Wilkinson*, 95 Fla. 457, 116 So. 78.

⁵¹ *School Dist. v Consolidated Dist.*, 110 Okla. 263, 237 Pac. 1110; *Bona-partie v American Vinegar Co.*, 161 Okla. 54, 17 Pac. (2) 441.

⁵² *Ex parte Holding*, 56 Ala. 458; *Gallup v Smith*, 59 Conn. 354, 22 Atl. 334, 12 L.R.A. 353; *Schick v Cincinnati*, 116 Ohio St. 16, 155 N.E. 555; *Allen v Lewis*, 26 Wyo. 85, 117 Pac. 433.

consequences or effect of non-compliance,⁵³ the indication is all the stronger that it should not be considered mandatory. But if the public interest or private rights⁵⁴ call for the exercise of the power vested in a public official, the language used, though permissive or directory in form,⁵⁵ is in fact peremptory or mandatory, as a general rule.⁵⁶ For example, where a statute declared that the board

⁵³ *State v Bird*, 295 Mo. 344, 244 S.W. 938; *Ousley v Powell* (Mo.) 12 S.W. (2) 102.

⁵⁴ *U.S. v Caplinger*, 18 Fed. (2) 898, cert. dis. 276 U.S. 604, 72 L.Ed. 727, 48 S.Ct. 338; *Howell v State*, 77 Fla. 119, 81 So. 752; *Phelps v Lodge*, 60 Kan. 122, 55 Pac. 840; *Hazelip v Fiscal Court*, 228 Ky. 80, 14 S.W. (2) 398; *Attleboro Trust Co. v Commissioner of Corps.*, 257 Mass. 43, 153 N.E. 333; *Granite Bitum. Paving Co. v McManus*, 114 Mo. Ap. 593, 129 S.W. 448; *People v Sisson*, 222 N.Y. 387, 118 N.E. 789; *State v Board of Educ.*, 95 Ohio St. 367, 116 N.E. 516; *Deseret Savings Bank v Francis*, 62 Utah 85, 217 Pac. 1114; *Ferris Press Brick Co. v Hawkins* (Tex. Civ. Ap.) 116 S.W. 80. An example of the application of the text will be found in *Uhl v Badaracco* (Calif.) 248 Pac. 917. In that case the statute provided that the supervisors "may" make appropriations from the receipts for enumerated purposes from the earnings of a public utility operated by the city, and the word "may" was construed as "shall" because of the public interest therein. But permissive words are not to be construed as imperative, where it would lead to the creation of new public obligations. *Hazelip v Fiscal Court* (Ky.) 14 S.W. (2) 398.

⁵⁵ *U.S. v Caplinger*, 18 Fed. (2) 898, cert. dis. 276 U.S. 604, 72 L.Ed. 727, 48 S.Ct. 338; *Conecut County v Carter*, 220 Ala. 668, 126 So. 132; *Washington County v Davis*, 162 Ark. 335, 258 S.W. 324; *Howell v State*, 77 Fla. 119, 81 So. 287; *Binder v Langhorst*, 234 Ill. 583, 85 N.E. 400; *Hazelip v Fiscal Court*, 228 Ky. 80, 14 S.W. (2) 398; *Hunter v Tracy*, 104 Minn. 378, 116 N.W. 922; *People v Land Office Comrs.*, 207 N.Y. 42, 100 N.E. 735; *Wagstaff v Central Highway Comm.*, 177 N.C. 354, 99 S.E. 1; *State v Barry*, 14 N.D. 316, 103 N.W. 637; *McLaughlin v Smith*, 105 Tex. 330, 148 S.W. 288.

⁵⁶ *Jennings v Suggs* (Ga.) 178 S.E. 282; *Attleboro v Comrs.* (Mass.) 153 N.E. 333. "It is likewise true that when a power is given to do an act which concerns the public interest, the execution of the power, when applied to a public officer or body, may be insisted upon as a duty, although the phraseology of the statute be permissive only; especially is this so when there is nothing in the act save the permissive form of expression to denote that the legislature designed to lodge a discretionary power merely. But where the power is lodged with persons exercising, or to exercise, legislative or judicial functions, and the subject matter of the statute and its phraseology concur in showing that the authority is essentially discretionary, no absolute duty is imposed." *McDade v City of Chester*, 117 Pa. 414, 12 Atl. 421. Also note *Rock Island County v U.S.*, 4 Wall. (U.S.) 435, 18 L.Ed. 419; *U.S. v Two Hundred and Sixty-Seven Twenty Dollar Gold Pieces*, 255 Fed. 217; *O'Connor v Bankers Trust Co.*, 289 N.Y.S. 252, 149 Misc. 920, and *State ex rel Foulger v Layton* (Del.) 144 Atl. 886. Also see cases under notes 54 and 55, supra.

of supervisors "may, if deemed advisable", levy a special tax to pay certain debts which their current revenue is insufficient to pay, the statute was held to be mandatory.⁵⁷ After all, the power vested in the officer is not for his benefit but for the benefit of the public or of third persons,⁵⁸ and it must be exercised.⁵⁹ A duty is imposed upon the officer rather than a privilege.⁶⁰ Conversely, however, where the statute simply regulates the manner in which public officers shall exercise the power vested in them in order to promote uniformity, order and convenience, the statute is predominantly intended for the benefit of the officers. Moreover, words mandatory in form should be construed to be permissive, even where statutes regulating the exercise of powers by public officials are concerned, if the permissive construction will effect justice, or save a proceeding from invalidity, provided, however, that such a construction does not destroy or impair the rights of the public, or of any member thereof.^{60a} In other words, whether a statutory requirement which relates to official action shall be considered mandatory or permissive, depends upon the effect the suggested construction has upon public and private rights. If the requirements of the statute must be regarded as mandatory in order to promote justice, it should be so construed; and if a mandatory construction operates mischievously, then the statute should be given a permissive construction, for in construing a statute it is not reasonable to presume that the legislature intended to violate a settled principle of natural justice or to destroy a vested right or to enact a mischievous law.

⁵⁷ *Rock Island County Sup'rs v U.S.* (U.S.) 4 Wall. 435, 18 L.Ed. 419. And see *U.S. ex rel Harriman National Bank v Caplinger*, 18 Fed. (2) 898, where "may issue" bonds to fund indebtedness, was held sufficient to support a writ of mandamus.

⁵⁸ *Rock Island County v U.S.*, 4 Wall (U.S.) 435, 18 L.Ed. 419.

⁵⁹ *Rock Island County v U.S.*, 4 Wall. (U.S.) 435, 18 L.Ed. 419; *Attleboro Trust Co. v Commissioner of Corps.*, 257 Mass. 43, 153 N.E. 333. Also see *DeTienne v Wellsville Firebrick Co.* (Mo.) 70 S.W. (2) 369, involving workmen's compensation act.

⁶⁰ *U.S. v Caplinger*, 18 Fed. (2) 898, cert. dis. 276 U.S. 604, 48 S.Ct. 338, 72 L.Ed. 727; *Binder v Langhorst*, 234 Ill. 583, 85 N.E. 400; *Hunter v Tracy*, 104 Minn. 378, 116 N.W. 922; *People v Buffalo*, 140 N.Y. 300, 35 N.E. 485; *State v Barry*, 14 N.D. 316, 103 N.W. 637.

^{60a} *People ex rel Chiperfield v Sanitary District*, 184 Ill. 597, 56 N.E. 953; *Clemens Electrical Mfg. Co. v Walton*, 168 Mass. 304, 47 N.E. 102; *Brinkley v Brinkley*, 56 N.Y. 192; *In re Thurber's Estate*, 162 N.Y. 244, 56 N.E. 631; *State ex rel Carpenter v St. Louis*, 318 Mo. 870, 2 S.W. (2) 713.

In this connection, the following quotation from an eminent English authority is quite enlightening:

“In the first place, a strong line of distinction may be drawn between cases where the prescriptions of the act affect the performance of a duty, and where they relate to a privilege or power. Where powers or rights are granted, with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty, would result if such requirements were essential and imperative.

“On the other hand, where the prescriptions relate to the performance of a public duty; and to invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them.” Maxwell, *Interpretation of Statutes* (6th Ed.), pp. 649, 650.

The case of *People v. Sutcliffe* (7 N. Y. S. (2) 431) may be taken as illustrating the rule that a statute which directs a public officer to do an act for the sake of justice, or which clothes a public officer or body with the power to do an act which concerns the public interests or the rights of individuals, shall be considered mandatory. Here, the statute provided that the magistrate “must inform the defendant” of the penalty before he elects whether to plead guilty or not guilty to a violation of the vehicle traffic law, so that the magistrate’s failure to so inform the defendant vitiated the entire proceedings.

§ 267. Statutes Relating to Judicial Action.—If a court has a discretion as to whether it shall act or not, a statute cannot compel

it to act,⁶¹ even though the word "must" is used.⁶² Similarly, if it has a discretion as to what relief it may grant, a statute cannot compel it to grant some particular relief.⁶³ In other words, so far as any matter involving the exercise of judicial judgment or discretion is concerned, mandatory words or language will usually be regarded as merely directory.⁶⁴ To hold otherwise, would be to destroy judicial discretion, and permit the legislature to invade the field of the judiciary.⁶⁵

But this does not mean that mandatory words must always be considered discretionary or directory. Under some circumstances, they will be construed to have their natural and ordinary imperative meaning. For instance, if a statute provides that a litigant is entitled to certain relief, if certain facts are proved, such relief must be awarded him upon the proof of such facts.⁶⁶ Indeed, if he is entitled to specified relief upon the proof of certain facts, permissive words may be construed as mandatory.⁶⁷ Similarly, if the court's

⁶¹ *Beasley v People*, 89 Ill. 571; *Sherrod & Co. v Hughes*, 110 Tenn. 311, 75 S.W. 717.

⁶² *Ex parte Banks*, 28 Ala. 28 (change of venue).

⁶³ *Clancy v McElroy*, 30 Wash. 567, 70 Pac. 1095.

⁶⁴ *Fagan v Robbins*, 96 Fla. 91, 117 So. 863 (deficiency decree in foreclosure); *People to Use of McKee v Abbott*, 105 Ill. 588; *In re Rutledge*, 162 N.Y. 31, 56 N.E. 511, 47 L.R.A. 721; *Becker v Lebanon, etc., R. Co.*, 188 Pa. 484, 41 Atl. 612 (injunction); *Clancy v McElroy*, 30 Wash. 567, 70 Pac. 1095 (removal of executor or administrator).

⁶⁵ See *People ex rel American Ice Co. v Nussbaum*, 32 Misc. 1, 66 N.Y.S. 129.

⁶⁶ *Ex parte Jordan*, 94 U.S. 248, 24 L.Ed. 123 (final decree); *First National Bank of Helena v Neill*, 13 Mont. 377, 34 Pac. 180 (court costs); *Rogers v Wing*, 5 How. Prac. (N.Y.) 50 (new trial); *Hazeltine v Simpson*, 61 Wis. 427, 21 N.W. 299 (vacating judgment). But see *Simpson v Winegar*, 122 Ore. 297, 258 Pac. 562, where the word "may" was used in a statute which provided that the judge may enlarge the time allowed within which to file transcripts, "but such order shall be made within the time allowed to file transcripts," and the statute was nevertheless held to be mandatory, since the rights of third persons as well as the public were affected.

⁶⁷ *Demartin v Demartin*, 85 Calif. 71, 24 Pac. 594 (setting aside home-
stead); *Havemeyer v San Francisco Sup. Court*, 84 Calif. 327, 24 Pac. 121,
10 L.R.A. 627 (appointment of receiver); *Chicago Public Stock Exchange v*
McLaughry, 148 Ill. 372, 36 N.E. 88 (continuance); *Forbes v Inhabitants of*
Bethel, 28 Me. 204 (allowance of interest); *Freud v Rohnbert*, 131 Mich.
606, 92 N.W. 109 (change of venue); *Montana Ore Purchasing Co. v Lind-*
say, 25 Mont. 24, 63 Pac. 715 (signing bill of exceptions); *Carter v Barnum*,
53 N.Y.S. 539, 24 Misc. 220 (court costs); *Pelletier v Saunders*, 67 N.C. 261
(examination of garnishee); *Falls of Neuse Mfg. Co. v Brower*, 105 N.C. 440,
11 S.E. 313 (change of venue).

jurisdiction is dependent upon the existence of certain facts or conditions, their existence is a condition precedent to the jurisdiction of the tribunal and cannot be dispensed with; for the court clearly cannot dispense with what the legislature has made the foundation of its jurisdiction or right to act.

§ 268. **Statutes Pertaining to Pleading and Practice.**—There seems to be considerable confusion with reference to the construction of statutes which pertain to pleading and practice in the courts as to whether their requirements are mandatory or permissive. Apparently, a statute which makes a requirement, the violation of which will operate to deprive the litigant of a substantial right and thus injure him or his case, should be given a mandatory construction.⁶⁸ Conversely, a statute which makes a requirement, which, if not met, in no manner materially affects the litigant's case nor deprives him of a substantial right, should be construed as permissive.⁶⁹ Of course, the difficulty largely lies in determining what requirements are necessary to preserve a litigant's rights and not prejudice his case, and in determining what rights are substantial.⁷⁰

But if a statute creates a new remedy or right not known to the common law and prescribes a certain mode for its enforcement,

⁶⁸ *Mercy Hospital v City of Chicago*, 187 Ill. 400, 58 N.E. 353; *Inhabitants of Monmouth v Inhabitants of Leeds*, 76 Me. 28; *Whitten v State*, 61 Miss. 717; *People ex rel Society of Free Church v Feitner*, 168 N.Y. 494, 61 N.E. 762. And note the dissent in *Ex parte Banks*, 28 Ala. 28, where an application for a change of venue was involved.

⁶⁹ *State v Smith*, 67 Me. 328; *Atchison, etc., F. R. Co. v Lawler*, 40 Neb. 356, 58 N.W. 587; *Morse v Press Pub. Co.*, 75 N.Y. Supp. 976, 71 Ap. Div. 351; *Atlantic, etc., R. Co. v Peake*, 87 Va. 130, 12 S.E. 348. Substantial compliance, under these circumstances, will, at least suffice. *Penberthy v Lee*, 51 Wis. 261, 8 N.W. 116 (instructions to jury in writing).

⁷⁰ The following cases involve rights held permissive: *Equitable Life Ins. Co. v Gleason*, 56 Iowa 47, 8 N.W. 790 (venue); *Whipple v Eddy*, 161 Ill. 114, 43 N.E. 789 (jury trial in will contest); *Bansemmer v Mace*, 18 Ind. 27 (use of deposition); *State v Sweetsir*, 53 Me. 438 (venue); *Heavor v Page*, 161 Mass. 109, 36 N.E. 750 (venue); *Osborn v Lidy*, 51 Ohio St. 90, 37 N.E. 434 (venue); *Carson v Phoenix Ins. Co.*, 41 W.Va. 136, 23 S.E. 552 (venue); *State v Massey*, 72 Vt. 210, 47 Atl. 834 (joinder of defendants in criminal cases). For rights held mandatory, see *Randolph County v Ralls*, 18 Ill. 29 (venue); *James v Dexter*, 112 Ill. 489 (time for appeal); *Western Travelers Acc. Ass'n v Taylor*, 62 Neb. 783, 87 N.W. 950 (venue); *Walton v*

it must be given a mandatory construction.⁷¹ And it would also seem that a criminal statute should be given a mandatory or permissive construction depending on which meets the requirements of a strict construction in favor of the defendant.⁷²

§ 269. Time for Performance of Official Duties.⁷³—As a general rule, a statute which specifies a time for the performance of an official duty will be construed as directory so far as the time for performance is concerned,⁷⁴ especially where the statute fixes the time simply for convenience or orderly procedure.⁷⁵ But there are various exceptions. For instance, the language may be such that the performance of the act within or at the specified time, is im-

Walton, 96 Tenn. 25, 33 S.W. 561 (venue); *Fleming v City of Appleton*, 55 Wis. 90, 12 N.W. 462 (time for appeal). And see *Hodecker v Hodecker*, 56 N.Y.S. 954 (filing of findings of fact). With reference to amended or supplemental pleadings, see *Roberts v Bartlett*, 26 Mo. Ap. 611; *Bartley v Smith*, 43 N.J.L. 321; *Medbury v Swan*, 46 N.Y. 200; *Welsh v Solenberger*, 85 Va. 441, 8 S.E. 91. Statutory or constitutional provisions that writs and processes shall run in the name of the state or be under seal have been considered directory. *Jump v McClurg*, 35 Mo. 193; *Doan v Boley*, 38 Mo. 449, although generally constitutional provisions are mandatory. *People v Lawrence*, 36 Barb. (N.Y.) 177.

⁷¹ *Platter v Elkhart County Comrs.*, 103 Ind. 360, 2 N.E. 544; *Stephens v Jones (S.D.)* 123 N.W. 705. Also see § 264, supra.

⁷² See *Buck v Danzenbacker*, 37 N.J.L. 359.

⁷³ For time for exercise of private privileges, see § 266, supra. And for treatment of statutes pertaining to official action, see § 266, supra.

⁷⁴ "In general, where a statute imposes upon a public officer the duty of performing some act relating to the interests of the public, and fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not a limitation of the exercise of the power, unless it contain some negative words, denying the exercise of the power after the time named; or from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature had in contemplation that the act had better not be performed at all than be performed at any other time than that named." *State v Smith*, 67 Me. 328. Also see *Webster v French*, 12 Ill. 302; *State v Grimm*, 115 Neb. 230, 212 N.W. 437; *Matter of Hennessy*, 164 N.Y. 393, 58 N.E. 446; *State v Barnell*, 109 Ohio St. 246, 142 N.E. 611; *Diebert v Rhodes*, 291 Pa. 550, 140 Atl. 515; *City of Uvalde v Burney (Tex. Civ. Ap.)* 145 S.W. 311; *National Surety Co. v Campbell*, 108 Wash. 596, 185 Pac. 602. But see *State Highway Comm. v Repale*, 111 N.J.L. 462, 168 Atl. 464.

⁷⁵ See *Yengel v Allen*, 179 Iowa 633, 161 N.W. 631.

perative.⁷⁶ As a result, if the statute contains prohibitive or negative words relating to the time within which the act is to be performed, it will be considered mandatory.⁷⁷ Furthermore, a statute may even make time the essence of the official act.⁷⁸ In such a case, the requirement as to the time of performance is also mandatory.⁷⁹ Moreover, the consequences of failing to perform the official act within or at the designated time, may be considered,⁸⁰ as indicative of the legislative intention.⁸¹ Even the nature of the act is entitled to consideration.⁸²

Furthermore, it may be asserted, as a general rule, that where a statute imposes upon a public officer the duty of performing some act relating to the interests of the public, and fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not as a limitation of the exercise of the power, unless it contains negative words, denying the exercise of the power after the time named, or unless from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the legislature

⁷⁶ *Simpson v Teftler*, 176 Ark. 1093, 5 S.W. (2) 350; *Rambeck v LaBree*, 156 Minn. 310, 194 N.W. 643; *Mead v Jasper County*, 322 Mo. 1191, 18 S.W. (2) 464; *Burkley v Omaha*, 102 Neb. 308, 167 N.W. 72; *Sheldon v Sheldon*, 100 N.J. Eq. 24, 134 Atl. 904; *State v Barnell*, 109 Ohio St. 246, 142 N.W. 611; *Walker v Edmonds*, 197 Pa. 645, 47 Atl. 867; *National Surety Co. v Campbell*, 108 Wash. 596, 185 Pac. 602.

⁷⁷ *Horkan v Beasley*, 11 Ga. Ap. 273, 75 S.E. 341; *State v Smith*, 67 Me. 328; *Rambeck v LaBree*, 156 Minn. 310, 194 N.W. 643; *Schick v Sheldon*, 100 N.J. Eq. 24, 134 Atl. 904; *Fallon v Hattemer*, 242 N.Y.S. 93, 229 Ap. Div. 397; *State v Siemens*, 68 Ore. 1, 133 Pac. 1173; *Common. v Painter*, 1 Pa. Dist. 393; *Allen v Lewis*, 26 Wyo. 85, 177 Pac. 433.

⁷⁸ *Colt v Eves*, 12 Conn. 243; *Stayton v Hulings*, 7 Ind. 144; *State v Smith*, 67 Me. 328.

⁷⁹ *Common. v Wozney*, 326 Pa. 494, 192 Atl. 648.

⁸⁰ *East Bay Municipal Utility Dist. v Garrison*, 191 Cal. 600, 218 Pac. 43; *State v Smith*, 67 Me. 328; *Rambeck v La Bree*, 156 Minn. 310; *Magee v Commonwealth*, 46 Pa. 358.

⁸¹ See § 266, *supra*.

⁸² *East Bay Municipal Utility Dist. v Garrison*, 191 Calif. 600, 218 Pac. 43; *Rambeck v La Bree*, 156 Minn. 310, 194 N.W. 643; *Mead v Jasper County*, 322 Mo. 1191, 18 S.W. (2) 464; *Matter of Clark*, 168 N.Y. 427, 61 N.E. 769; *State v Barnell*, 109 Ohio St. 246, 142 N.E. 611; *State v Siemens*, 68 Ore. 1, 133 Pac. 1173; *National Surety Co. v Campbell*, 108 Wash. 596, 185 Pac. 602.

had in contemplation that the act had better not be performed at all than be performed at any other time than that named.⁸³

§ 270. **Miscellaneous Statutes—Taxation, Bonds, Licenses, Elections, etc.**—In accord with the rule applicable to statutes generally, which we have hitherto discussed,⁸⁴ statutes regulating the assessment of taxes must be given a mandatory construction, if their purpose is to protect the taxpayer.⁸⁵ On the other hand, if the statute is simply intended to establish a uniform system of procedure and to promote dispatch, and if non-compliance does not injure the taxpayer, the statute is to be construed as directory.⁸⁶

So statutes which regulate the manner, time and place of the sale of property for delinquent taxes, must be considered manda-

⁸³ State v Smith, 67 Me. 328 (statute requiring venires for grand jurors to be issued forty days at least before the second Monday of September annually).

⁸⁴ See § 261, *supra*. For construction of sales tax statutes, see § 359, *infra*.

⁸⁵ "One rule is very plain and well settled that all those measures which are intended for the security of the citizen, for securing equality of taxation, and to enable everyone to know with reasonable certainty for what real and personal property he is taxed are conditions precedent; and if they are not observed he is not legally taxed, and he may resist it in any of the modes provided by law for contesting the validity of the tax." *Torrey v Millbury* (Mass.) 21 Pick. 64. Also see *State Auditor v Jackson County*, 65 Ala. 142; *Wiley v Flournoy*, 30 Ark. 609 (review); *Ryan v Bryan* (Calif.) 51 Pac. (2) 872; *City of Indianapolis v McAvoy*, 86 Ind. 587 (correction of assessment); *Warfield v Averill Grocery Co.*, 119 Iowa 75, 93 N.W. 80; *Clark v Crane*, 5 Mich. 151; *Cromwell v MacLean*, 123 N.Y. 474, 25 N.E. 932; *Young v Joslin*, 13 R.I. 675.

⁸⁶ "But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of tax-paying citizens. These may be considered as directory; officers may be liable to an inadversion, perhaps to punishment, for not observing them, but yet their observation is not a condition precedent to the validity of the tax." *Torrey v Millbury* (Mass.) 21 Pick. 64. Also see *State Auditor v Jackson County*, 65 Ala. 142; *Ryan v Bryan* (Calif.) 51 Pac. (2) 872; *Adam v Town of Seymour*, 30 Conn. 402.

tory.⁸⁷ The same is equally true with statutes which authorize municipal corporations to levy taxes for the necessary public functions of the city,⁸⁸ as well as with those authorizing taxes for the payment of bonds, judgments, or which otherwise affect the rights of third persons so far as an indebtedness is concerned.⁸⁹

And creatures of the statute which have been formed for a special purpose with limited powers, such as corporations, must comply with the statutory requirements regulating the exercise of those powers.⁹⁰ But statutes which authorize an officer or board to grant licenses to certain persons to engage in a specified occupation or business, as a general rule, will be regarded as discretionary.⁹¹ Usually, statutes regulating the form and mode of execution of a bond will be considered directory.⁹² This is also the rule with reference to statutes regulating the conduct of public elections,⁹³ since

⁸⁷ *Mason v Fearson*, 9 How. (U.S.) 248, 13 L.Ed. 125 (parcels to be sold separately); *Milner v Clarke*, 61 Ala. 258 (notice by public advertisement); *Chicago, etc., R. Co. v People ex rel Wood*, 163 Ill. 616, 45 N.E. 122 (form of certificate of tax sale); *Rubey v Huntsman*, 32 Mo. 501 (place of sale); *Richards v Cole*, 31 Kan. 205, 1 Pac. 647 (place of sale); *State ex rel Snow v Farney*, 36 Neb. 537, 54 N.W. 862 (time); and see *Hendrix v Boggs*, 15 Neb. 469, 20 N.W. 28 (notice of expiration of redemption period.)

⁸⁸ *Kennedy v City of Sacramento*, 19 Fed. 580; *Village of Kent v U.S.*, 113 Fed. 232; *Rock Island County Sup'rs v U.S. ex rel State Bank (U.S.)* 4 Wall. 435, 18 L.Ed. 419; *People ex rel Reynolds v Common Council*, 140 N.Y. 300, 35 N.E. 485; *Exchange Bank v Lewis County*, 28 W.Va. 273.

⁸⁹ *Ibid.*

⁹⁰ *Beckett v Uniontown Building Assoc.*, 88 Pa. St. 211. Also see *Bigelow v Gregory*, 73 Ill. 197 (filing of certificate of corporation).

⁹¹ *Batters v Dunning*, 49 Conn. 479; *State ex rel Kyger v Holt County Court*, 39 Mo. 521; *Muller v Buncombe County Comrs.*, 89 N.C. 171; *In re Raudenbusch*, 120 Pa. 328, 14 Atl. 148; *Ailstock v Page*, 77 Va. 386; and see *Ex parte Whittington*, 34 Ark. 394; *Armstrong v Murphy*, 72 N.Y.S. 473, 65 Ap. Div. 132. But see *Zanone v City of Mound City*, 11 Ill. Ap. 334; *State ex rel Brockett v City of Alliance*, 65 Neb. 524, 91 N.W. 387; *McLeod v Scott*, 21 Ore. 94, 26 Pac. 1061. And note *Greater N.Y. Athletic Club v Wurster*, 43 N.Y.S. 703. For construction of license statutes, see § 357, *infra*.

⁹² *Bartlett v Board*, 59 Ill. 364; *St. Louis, etc., R. Co. v Wilder*, 17 Kan. 244; *Supervisors v Kaime*, 39 Wis. 368.

⁹³ *Dale v Irwin*, 78 Ill. 170; *Duncan v Shenk*, 109 Ind. 26, 9 N.E. 690; *Farrington v Turner*, 53 Mich. 27, 18 N.W. 544; *Bowers v Smith*, 111 Mo. 45, 20 S.W. 101; *Fry v Booth*, 19 Ohio St. 25. And see *Wakefield v Patterson*, 25 Kan. 709.

anything which prevents a free and full expression of the public will should, under no circumstances, be upheld.⁹⁴

§ 271. Miscellaneous Implied Exceptions from the Requirements of Mandatory Statutes, In General.—Even where a statute is clearly mandatory or prohibitory, yet, in many instances, the courts will regard certain conduct beyond the prohibition of the statute through the use of various devices or principles. Most, if not all of these devices find their justification in considerations of justice. It is a well known fact that often to enforce the law to its letter produces manifest injustice, for frequently equitable and humane considerations, and other considerations of a closely related nature, would seem to be of a sufficient calibre to excuse or justify a technical violation of the law.

In order to eliminate cases of this character from the prohibitory and penal provisions of the law, the courts have in numerous cases recognized that these considerations are sufficient to relieve or exempt the actor from the statute's provisions. Of course, this action upon the part of the court may be justified by the principle that the legislature must not be presumed to enact a statute which will operate harshly and inequitably, and that where the statute operates fairly generally, a presumption also arises that if the law operates unjustly in a given case, the legislature intended to

⁹⁴ See *Bowers v Smith*, 111 Mo. 45, 20 S.W. 101. By virtue of this rule, a provision that no ballot shall be counted unless cancelled, was held to be directory, where the failure to cancel was due solely to the failure of a mechanical device: "Whether an election statute couched in positive words of command is to be construed as intended to invalidate ballots actually cast under all the sanctions of the law must be determined from a broad view of the end and aim of elections and election law rather than from resort to strict logomachy and syntax . . . The regnant design of all election laws is to provide expeditious and convenient means for expression of the will of the voters free from fraud. The right to vote is a precious personal prerogative to be sedulously guarded. The public welfare demands that elections be protected from fraud. If and when those interests conflict, troublesome problems may arise, but presumably the public welfare must be held paramount. Election laws are framed to afford opportunity for the orderly expression by duly qualified voters of their preferences among candidates for office, not to frustrate such expression. The cardinal rule, to be followed by election officers and courts in election matters is to ascertain the intent of the voter as disclosed by the official ballot actually cast and to give effect to that intent by counting the ballot cast . . ." *Swift v Registrars of Quincy*, 281 Mass. 271, 183 N.E. 730.

exempt such case from the scope of the statute. This, of itself, should completely dispose of the objection that to allow the court to make exceptions simply allows the court to exercise the legislative power.

But this objection fades away, if we will accept the view that at best the legislature can only lay down a broad and general rule to govern our conduct, and leave the determination of specific cases to the court in accord with the general legislative intent that the law is designed to promote justice as determined from our standards of ethics. Rarely, if ever, can the legislature lay down a law which will reveal a specific intent clearly applicable to all cases which will or may arise. Indeed, is it not an essential part of the judicial power to deal with specific cases, where no specific legislative intent appears, in the light of the basic general legislative intention that the law shall operate fairly? If so, then these so-called exceptions from the mandatory provisions of the law, may properly be recognized by the courts without any violation of the tri-partite theory of government.

§ 272. Waiver of, and Estoppel to Assert Statutory Provisions.

—Whether a statutory provision can be waived involves a question closely related to, if not a part of the problem of mandatory and permissive construction. Certain laws are recognized to be of less importance than others; consequently, the factor which determines their importance, constitutes the factor which will determine whether a statutory provision may be waived. The rule in this connection has been announced as follows:

“Another maxim which sanctions the non-observance of a statutory provision is that *cuiuslibet licet renuntiare juri pro se introducto*. Everyone has a right to waive, and agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity, and which may be dispensed with without infringing on any public right.”⁹⁵

⁹⁵ Maxwell, Interpretation of Statutes (6th Ed.—1920) p. 678. “A party may waive a constitutional as well as a statute provision made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty, on the ground that the constitution had secured him a trial by jury. *Lee v Tillotson* (N.Y.) 24 Wend. 337. But see *People ex rel Battista v Christian*, 249 N.Y. 314, 164 N.E. 111, that constitutional provision for indictment by grand jury for capital crime, cannot be waived.

"But when public policy requires the observance of the provision, it cannot be waived by an individual. *Privatorum convento juri publico non derogat.*"⁹⁶

Consequently, the statutory prescription of the form of a fire insurance policy, since it was founded on public policy, was such a provision of the law which could not be waived.⁹⁷ On the other

⁹⁶ Maxwell, Interpretation of Statutes (6th Ed.—1920), p. 681.

⁹⁷ Heim v American Alliance Insurance Co., 147 Minn. 283, 180 N.W. 225. Also note Gazzam v German Union Fire Insurance Co., 155 N.C. 330, 71 S.E. 434: "In construing this statute we must consider the purpose which the legislature had in view. It was not to subserve any public policy. Contracts of insurance, so far as the public are concerned, stand upon no different basis than other contracts. The object was to protect policyholders and to provide a policy fair to the insured and the insurer, and avoid litigation. It was undoubtedly well known to the legislature that policyholders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make, involving their ordinary business transactions. The statute imposes a penalty upon an insurance company for issuing such a policy, but imposes none upon the insured. In using the word 'void', the legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and when loss occurs, say to the insured, 'Your policy is void, because we inserted a clause in it contrary to the law of Michigan.' Such a result would be a reproach upon the legislature and the law. The law, so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the legislature had in view." To same effect, see Armstrong v Western Manufacturers' Mut. Ins. Co., 95 Mich. 139, 54 N.W. 638. "It is also generally held that stipulations contained in the policy, upon which it shall have its inception and become operative as a contract may be waived. The court says, in Wood v American Fire Ins. Co., 149 N.Y. 385, 44 N.E. 81, 52 Am.St. Rep. 733, that this doctrine "has long been settled." "Nor has the rule that doubtful terms are to receive the construction favorable to the insured been changed. . . . It has been contended that inasmuch as the law compels the use of the standard policy, and will not allow any variance from it, excepting in certain limited particulars, the insurer cannot be regarded as selecting the terms of the contract and subjected to an unfavorable rule of construction on that account. This contention, however, has been held to be without merit, for the terms of these statutory policies were chosen with reference to the construction given by the precedent cases to similar terms in other policies, and therefore ought to be regarded as being used in the sense of their previous construction. It is also apparent from an examination of the instruments themselves, as well as the history of their adoption, that their terms were really chosen by the underwriters with particular reference to their own interests." Gazzam v German Union Fire Insurance Co., 155 N.C. 330, 71 S.E. 434. Also see Griffith v New York L. Ins. Co., 101 Calif. 627, 36 Pac. 113.

hand, a party may decline to assert the statute of limitations or any other defense of which the law allows him to avail himself, since they are rights which the law gives to him to assert for his individual benefit.⁹⁸ Similarly, matters such as notices of appeal and security, being in the nature of procedure and practice, may be waived, as they are intended for the benefit of the respondent.⁹⁹ But matters upon which the jurisdiction of the court depends, since they do not refer to matters of procedure which are enacted for the benefit of the individual, cannot be waived.¹⁰⁰

Some cases, even with reference to matters relating to procedure, make a distinction between declining to take advantage of a privilege which the law allows a party, and binding oneself by contract that he will not avail himself of a right which the law has allowed to him.¹⁰¹

“Another principle is also relied on—that a party may decline to assert a right which the law gives him the power to assert for his individual benefit; he may decline to plead the statute of limitations, or to make any other defense of which the law allows him to avail himself. But there appears to be a plain distinction between declining to take advantage of a privilege which the law allows to a party, and binding himself by contract that he will not avail himself of a right which the law has allowed to him on grounds of public policy. A man may decline to set up the defense of usury, or the statute of limitations, or failure of consideration, to an action on a promissory note. But it would scarcely be contended that a stipulation inserted in such a note, that he would never set up such defense, would debar him of the defense, if he thought fit to make it.”¹⁰²

As is therefore apparent, this view is based upon public policy—a policy which, so far as the statute of limitations is concerned, re-

⁹⁸ *Crane v French*, 38 Miss. 503; *State Trust Co. v Sheldon*, 68 Vt. 259, 35 Atl. 177.

⁹⁹ *Park Gate Iron Co., Ltd., v Coates (Eng.)* L.R. 5 C.P. 634.

¹⁰⁰ *Eaton v Eaton*, 233 Mass. 351, 124 N.E. 37, 5 A.L.R. 1426; *Tari v State*, 117 Ohio St. 481, 159 N.E. 594; *Nevitt v Wilson*, 116 Tex. 29, 285 S.W. 1079, 48 A.L.R. 355. While jurisdiction of subject matter may not be waived, jurisdiction of the person may. *State v Ricciardi*, 81 N.H. 223, 123 Atl. 606, 34 A.L.R. 609. Also see § 267, *supra*.

¹⁰¹ *Crane v French*, 38 Miss. 503. Also see *Brownrigg v De Frees*, 196 Calif. 534, 238 Pac. 714; *Wright v Gardner*, 98 Ky. 454, 35 S.W. 1116, and the note in 15 Calif. L.Rev. 74.

¹⁰² *Crane v French*, *ibid*.

quires suits to be brought in due season and discourages stale demands, as calculated to promote litigation, and to prejudice the just rights of parties. It stands upon the same reason—the public good, as the laws in relation to usury.

“Suppose, then, an agreement made by the maker of a note that he would not set up the defense of usury. Would an action lie for a breach of that agreement, in case the party would make the defense in disregard of it? It appears not; and the reason is, that the right to make the defense is not only a private right to the individual, but it is founded on public policy, which is promoted by his making the defense and contravened by his refusal to make it. The same principle is applicable to the policy of statutes of limitations; and with regard to all such matters of public policy, it would seem that no man can bind himself by estoppel not to assert a right which the law gives him on reasons of public policy.”¹⁰³

But those cases which allow the right of defense granted by the statute of limitations to be waived, do so upon the ground that no principle of public policy is thereby violated:

“The statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals. Its protection, therefore, may be waived in legal form by those who are entitled to it, and such waiver, when acted upon, becomes an estoppel to plead the statute.”¹⁰⁴

As in the case of waiver, there is confusion in the law with reference to the part played by estoppel in determining whether a person can by his conduct be estopped from relying upon or asserting a given statute. There is authority, so far as the statute of limitations is concerned, that an estoppel can come into existence:

“The conversation referred to occurred before the statute had run, and it was a distinct promise to pay in consideration that the plaintiff below would not sue. If, therefore, she relied upon this promise; if she was thereby lulled into security, and thus allowed the six years to go by before she commenced her suit, with what grace can the defendant now set up the statute? The promise operated not to revive a dead tort, but by way of estoppel. It has all the elements of an estoppel. The plaintiff relied and acted upon it; she had been misled to her injury; but for the defendant’s promise she would have commenced her action before the six years had expired. We think the

¹⁰³ Ibid.

¹⁰⁴ State Trust Co. v Sheldon, 68 Vt. 259, 35 Atl. 177.

learned judge below was right in holding that the six years would only commence to run from the date of the promise. . . ”¹⁰⁵

And there is authority that an estoppel cannot be relied upon, at least, with reference to the provisions of the Negotiable Instruments Act which require an acceptance to be in writing :

“The established rule, although not of universal application, is that equity follows the law, or, as stated in *Magniac v Thomson*, 15 How. 281, 14 L.Ed. 696, ‘that, wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable.’ . . . Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and, where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof.

“The Negotiable Instruments Act entailed no hardship on the plaintiffs, for they might have asked for a certified check, or might have obtained a lawful acceptance, and to permit them to recover on the theory proposed would loose again upon the business world the evils which the statute was designed to repress.”¹⁰⁶

It would, therefore, seem that the decisive factor in determining whether one might by his conduct be estopped from relying upon a statute, will be found in the nature of the statute. Here, as with waiver, if the statute makes a provision for the protection or benefit of individuals, they may be estopped from asserting the benefit or protection afforded to them by the law, unless the statute is also enacted to secure general objects of policy or morals.

¹⁰⁵ *Armstrong v Levan*, 109 Pa. 177, 1 Atl. 204. Also see *Gillingham v Brown*, 178 Mass. 417, 60 N.E. 122, 55 L.R.A. 320, involving waiver of a statute after the period of limitations has run, on a contract claim. For further cases, see 1 Williston, *Contracts* (1924) §§ 160 and 163.

¹⁰⁶ *Rambo v First State Bank*, 88 Kan. 257, 128 Pac. 182. Even an estoppel may come into existence preventing a party from relying upon the unconstitutionality of a statute as a defense, especially where money has been obtained under such statute. *Ferguson v Landram* (Ky.) 5 Bush. 230, 96 Am.Dec. 350. Also see *Greene County v Lydy*, 263 Mo. 77, 172 S.W. 376, involving an estoppel to deny the validity of a statute by a public official who has accepted compensation under it.

It may be possible that the doctrine of estoppel could apply in criminal prosecutions; at least, it has been said that it is frequently invoked therein, and that where applicable, it does not differ in principle from the same rule in civil actions.¹⁰⁷ Yet the cases where the doctrine should be applied must be relatively few.

§ 273. Justification for Non-Compliance with Statutory Provisions.—Frequently, especially with reference to the provisions of penal statutes, certain reasons will be urged in justification of a failure to follow the mandates of the law. Sometimes the reason will be accepted as sufficient and sometimes it will not. It is probably impossible to lay down any general principle which can be applied in every instance, as each case seems to stand upon its own merits and the court's attitude concerning the apparent intent of the legislature. A few illustrations will, however, indicate what may be sufficient to justify the violation of the requirements of the law.

Necessity has been often urged as a ground of justification,¹⁰⁸ and in numerous instances it should undoubtedly be accepted as excluding one from the operation of a penal statute largely because of humane and equitable considerations. The proper attitude seems to be that taken by the court in *State v Wray*,¹⁰⁹ in which the defendants were indicted for retailing spirituous liquors without a license, and the defense was raised that the liquor was to be used by the purchaser for a sick lady:

“The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all the States in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops the other should also.

¹⁰⁷ *People v Main*, 75 Calif. Ap. 471, 242 Pac. 1078. But note *Sigmon v Common.*, 207 Ky. 786, 270 S.W. 40, 42: “A recovery of the money expended in good faith and without fraud for a legal purpose but in an illegal manner, was denied under the doctrine of equitable estoppel which, while sometimes available as a defense . . . in a civil action, is never a defense in a criminal prosecution for the violation of the statute.”

¹⁰⁸ See *The Gertrude*, 3 Story, 68 Fed. Cas. No. 5,370, and the cases there collected.

¹⁰⁹ *State v Wray*, 72 N.C. 253. Contra: *State v Mellor*, 140 Md. 364, 117 Atl. 875.

What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time the revenues of the state. . . . A physician prescribes the brandy as a medicine for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be that a pure article of brandy, such as the physician was willing to administer as a medicine, was not to be obtained elsewhere than at the defendants' drug store. The doctor himself goes to the defendants and directs them to let the witness have the brandy as a medicine for his wife. And the further fact is found, which perhaps might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the further and very important fact is established, that in this case it was bought in good faith as a medicine, and was used as such. . . .

In favor of defendants, criminal statutes are both contracted and expanded. 1 Bishop, par. 261. Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law that no one shall suffer criminally for an act in which his mind does not concur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted 'that whosoever drew blood in the street should be punished with the utmost severity.' A person fell down in the street with a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this it has never been considered a violation of the spirit of the law. Perhaps it will give us a clearer view of the case if we put the druggist out of the question, and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as medicine. Can it be pretended that he would be any more guilty of a violation of our statute than the surgeon was guilty of a violation of the Bolognian law? We think not.

But we would not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine."

Yet, in an almost identical case another court has taken the opposite view:

"It is admitted that appellant is a druggist and sold one quart of whiskey to the person named in the affidavit, but

... appellant further insists that 'a sale of intoxicating liquor made by a druggist in good faith and for medicinal purpose, with reasonable caution, is not a violation of law.' ... The intention (of the statute) is to prohibit the sale on those days except in cases of sickness. And in order that this intention shall not be thwarted by feigned sickness, the prescription is required; and that there may be no imposition here the physician must be a regular practicing physician; and still further to guard against imposition, the physician must be of the county where the liquor is to be sold, so that the druggists and the authorities may be more likely to have a personal acquaintance with him. This condition is the barrier erected about the sale by druggists on those days. To hold that the sale may be made on those days without the prescription, would be to override and break down that barrier. Such a holding would be in conflict with both the spirit and letter of the statute. It would carry us beyond the boundaries of interpretation and construction, into the domain of legislation. The argument, that cases of emergency may arise where it may be inconvenient, if not impossible, to procure such a prescription in time to prevent serious consequences, may have force when addressed to legislators, but it cannot be controlling with the courts, whose duty it is to declare the law as enacted by the law-making branch of the government." ¹¹⁰

Of course, a technical violation of the law may be justified in order to save the life or to relieve the suffering of another. In fact, instances may also exist where a person may disregard with immunity the dictates of the law, in order to save his own life, or to protect his own person from harm and injury, particularly where the life or limb of another person is not endangered. For example, one may be coerced into committing an act which under no other condition would he commit; but the coercion to excuse must be immediate and such as to induce a well-grounded apprehension of death or serious bodily injury, if the act is not done; and one having full opportunity to avoid the act without such danger, cannot invoke the doctrine.¹¹¹ As is therefore apparent, not all coercion will constitute a good defense. Mere economic necessity will not be

¹¹⁰ Ryan v State, 174 Ind. 468, 92 N.E. 340. Also see People v Taylor, 110 Mich. 491, 68 N.W. 303: "We think this testimony fails to show any overruling necessity for opening the saloon and admitting people indiscriminately . . . there was a drug store within a few feet. . . ."

¹¹¹ Shannon v U.S., 76 Fed. (2) 490. Also see People v Sanders, 82 Calif. Ap. 778, 256 Pac. 251; Turner v State, 117 Tex. Cr. 434, 37 S.W. (2) 747.

a good defense,¹¹² nor the simple fact that one's job depended upon the obedience of an order which violates the law.¹¹³ Nor will threats of future prosecution for a prior larceny constitute a defense to a charge of embezzlement.¹¹⁴ The same is true with a future threat of harm.¹¹⁵ And probably most cases refuse to recognize the right of a prisoner to escape from jail or custody in order to avoid ordinary adverse circumstances,¹¹⁶ so that neither the insanitary condition of the jail,¹¹⁷ fear of violence from third persons,¹¹⁸ nor unmerited punishment at the hands of the custodian,¹¹⁹ will present a situation which the law may accept as a valid excuse for the violation of a statute.

Circumstances may also justify the commission of a forbidden act in order to protect one's property, but, as the court said in *State v Urban*:¹²⁰

"Not every trifling, casual, occasional, or technical destruction of property which would justify respondent in taking matters into his own hands and violating the statutes of this state upon the theory that he was justified in so doing by a constitutional right of protection of property."

¹¹² *State v More*, 174 Wash. 303, 24 Pac. (2) 638. "Nor, ordinarily, at least, will the law of necessity prove sufficient as a legal excuse. For example, take the extreme case of a man burglarizing a bakery for the sole purpose of procuring bread for his starving babes. Even in such dire circumstances, so far as the particular offense is concerned, the law itself is powerless to accept the excuse." *People v Whipple*, 100 Calif. Ap. 261, 279 Pac. 1009.

¹¹³ *Moore v State*, 23 Ala. Ap. 432, 127 So. 796.

¹¹⁴ *State v Patterson*, 117 Ore. 153, 241 Pac. 977.

¹¹⁵ *State v Clay* (Iowa) 264 N.W. 77.

¹¹⁶ *People v Whipple*, 100 Calif. Ap. 261, 279 Pac. 1009, and cases there cited.

¹¹⁷ *State v Davis*, 14 Nev. 439.

¹¹⁸ *Hinkle v Common.* (Ky.) 66 S.W. 816.

¹¹⁹ *Johnson v State*, 122 Ga. 172, 50 S.E. 65. Also see *State v Cahill*, 196 Iowa 486, 194 N.W. 191, that insufficient food, bugs, vermin, etc., would not justify an attempt to escape from jail.

¹²⁰ *State v Urban*, 60 S.D. 614, 245 N.W. 474, where a complaint charging that defendant unlawfully shot a pheasant in defense of property, was held not demurrable as showing a legal justification or excuse. One may use whatever means are necessary to protect himself or his property against unlawful force and violence and where there is a reasonable cause to believe such force is about to be exercised. *People v Chambers* (Calif.) 72 Pac. (2) 746.

And in *People v Biggs*,¹²¹ it was held that one who obtained payment from a thief of the value of property stolen by him by threatening him with an accusation and prosecution thereon unless he made such payment, was guilty of the crime of extortion, without regard to the exercise of good faith in exacting the amount justly due.

Sometimes the obligation to perform a specific task or duty may be so important that the court will regard a disobedience of the law as justified. This is true where a soldier obeys an order of a superior officer,¹²² and where an officer of the law makes an arrest.¹²³ Similarly, an act of God or the public enemy should generally be accepted by the court as a complete defense.¹²⁴

Behind the cases which refuse to accept these acts as a sufficient justification for failing to obey the mandates of the law, we find the following philosophy:

“The probation law is broad and comprehensive in its scope. The relief of a defendant, who, by reason of mitigating circumstances, seeks exemption from punishment for the commission of a crime by him, must rest upon the liberal terms of that statute and the wise discretion of the trial court”.¹²⁵

Or the refusal may be based upon the ground that the court would be forced to invade the legislative field.¹²⁶ Yet, absolute necessity should be a defense, especially where no injury is inflicted upon the person of another and restitution has been made for any property damage.¹²⁷ Our statutory law must rest upon principles of justice and humanity, if it is to be a practical system. And it does no injury to the tri-partite theory of government to recognize certain acts as implied exceptions from the prohibitory language of the statute.

¹²¹ *People v Biggs*, 178 Calif. 79, 172 Pac. 152. For further treatment of self help in the collection of debts as a defense to criminal prosecution, see Note, XXIV Wash. Univ. Laws, Q. 117 (1933).

¹²² *Common. v Shortall*, 206 Pa. St. 165, 55 Atl. 952.

¹²³ Officer arresting a mail carrier held not guilty of obstructing the mails. *U.S. v Kirby (U.S.)*, 7 Wall. 482, 19 L.Ed. 278. Contra: *U.S. v Barney*, Fed. Cas. No. 14,525, and *U.S. v Harvey*, Fed. Cas. No. 15,320.

¹²⁴ *Chesapeake & Ohio R. Co. v Common.*, 119 Ky. 519, 84 S.W. 566 (land-slide); *Campbell v Earl of Dolhousie (Eng.)* L.R. 1 H.L. (s.c.) 259.

¹²⁵ *People v Whipple*, 100 Calif. Ap. 261, 279 Pac. 1009.

¹²⁶ *Ryan v State*, 174 Ind. 468, 92 N.E. 340.

¹²⁷ That there is no excuse for taking an innocent life, see *Arp v State*, 97 Ala. 5, 12 So. 301, 19 L.R.A. 357.

§ 274. Excuses for Non-Compliance with Statutory Provisions.

—In order to maintain a practical and humane system of statutory law, occasions will arise where the meeting of the prohibitory or mandatory requirements of the law may be excused or overlooked.¹²⁸ Nevertheless, it will be in only extreme cases where compliance with the law may be excused. Many excuses have been set up by way of defense without success.

Many interesting cases will be found in this category. For instance, custom cannot be successfully set up as a defense to a criminal prosecution,¹²⁹ nor will common practice throughout the state in violation of a penal statute¹³⁰ or the existence of a prevailing idea or general understanding that a certain act might be performed legally,¹³¹ preclude a prosecution for a violation of the law. Similarly, the fact that the officers permitted others to violate the law will not be a valid excuse or defense.¹³²

Occasionally, restitution,¹³³ condonation,¹³⁴ consent,¹³⁵ ratification,¹³⁶ settlement,¹³⁷ and the like, may be urged as a defense to a criminal prosecution. Usually, as indicated by the cases cited, none of these will excuse the defendant or free him from criminal liability, although some instances may be found wherein the defendant has been held free from liability. This has often been the case where the defendant has been entrapped:

“There can be no doubt but that one against whom a crime is contemplated may remain silent and permit matters to go on for the purpose of apprehending the criminal, without being held to have consented to the taking of his property, for the consent which will relieve an act of its criminal character must

¹²⁸ Also see § 273, *supra*, for discussion of defenses by way of justification.

¹²⁹ *Cain v State*, 18 Ala. Ap. 624, 93 So. 263; *People v Klein*, 305 Ill. 141, 137 N.E. 145; *State v Corallogas*, 101 Vt. 300, 143 Atl. 284, 59 A.L.R. 1541.

¹³⁰ *Garret v State* (Ala. Ap.) 178 So. 825.

¹³¹ *Broadfoot v State* (Ala. Ap.) 182 So. 411.

¹³² *Creash v State* (Fla.) 179 So. 149; *Brown v State*, 57 Ga. Ap. 838, 197 S.E. 77.

¹³³ *Savitt v U.S.*, 59 Fed. (2) 541.

¹³⁴ *State v Kiewel*, 173 Minn. 473, 217 N.W. 598; *State v Thomas*, 318 Mo. 605.

¹³⁵ *State v Neeley*, 90 Mont. 199, 300 Pac. 561.

¹³⁶ *State v Craig*, 124 Kan. 340, 259 Pac. 802, 54 A.L.R. 1233.

¹³⁷ See cases under note 134. *supra*.

be more than a mere passive submission, without previous understanding with the criminal".¹³⁸

Moreover, settlements made in the manner prescribed by other statutes have operated as a bar to penal prosecutions.¹³⁹ Similarly, in some jurisdictions, largely upon considerations of public policy,¹⁴⁰ promises of immunity made by the state constitute a good defense,¹⁴¹ although other jurisdictions refuse to recognize the validity of such promises.¹⁴² Since promises of immunity are basically pledges of the public faith, the state should be held to the terms of such promises.¹⁴³

It is also a general proposition that ignorance of the law will not operate as an excuse for a crime,¹⁴⁴ but where an intent to commit the crime constitutes an essential element of the offense, it may be a good defense.¹⁴⁵ On the other hand, a mistake of fact has been held a valid excuse and a bar to prosecution.¹⁴⁶

Contributory negligence may in proper cases be a valid excuse for exempting a defendant from liability, although so far as criminal prosecutions are concerned the contributory negligence of the injured person cannot constitute a defense.¹⁴⁷ Obviously, to allow

¹³⁸ *State v Neeley*, 90 Mont. 199, 300 Pac. 561.

¹³⁹ *Common. v Hickman*, 113 Pa. Super. 70, 172 Atl. 28.

¹⁴⁰ *Ingram v Prescott*, 111 Fla. 320, 149 So. 369; *People v Bogolowski*, 326 Ill. 253, 157 N.E. 181; *Eden v State*, 54 Okla. Cr. 265, 21 Pac. (2) 775.

¹⁴¹ *Ibid.*

¹⁴² *U.S. v Pleva*, 66 Fed. (2) 452; *State v Myers*, 330 Mo. 84, 49 S.W. (2) 36. Witness compelled to testify under compulsion, however, may be granted immunity. *People v Schwarz*, 78 Calif. Ap. 561, 284 Pac. 990; *Evans v State*, 157 Miss. 645, 128 So. 737.

¹⁴³ *State v Ward*, 112 W.Va. 552, 165 S.E. 803, 85 A.L.R. 1175.

¹⁴⁴ *Common. v O'Connell*, 274 Mass. 315, 174 N.E. 665; *Hunter v State*, 158 Tenn. 63, 12 S.W. (2) 361, 61 A.L.R. 1148; *State v Woods*, 107 Vt. 354, 179 Atl. 1. Consequently, female respondent's honest belief in the validity of the divorce from his former wife by the man whom respondent married, and of the validity of her marriage, constituted no defense for a prosecution for adultery. *State v Wood*, 107 Vt. 354, 179 Atl. 1. Nor is the advice of counsel a valid defense. *Nall v Common.*, 208 Ky. 700, 271 S.W. 1059. Yet a mistaken belief in, or reliance on the constitutionality of a statute has been held a good defense. See Note, 61 A.L.R. 1148.

¹⁴⁵ *Hargrove v U.S.*, 67 Fed. (2) 820.

¹⁴⁶ *Wess v South Dak. Packing Co.*, 43 S.D. 467, 180 N.W. 510 (sale of diseased hog). Contra: *Hamilton v State (Tex.)* 20 S.W. (2) 777.

¹⁴⁷ *State v Thomlinson*, 209 Iowa 555, 228 N.W. 80 (manslaughter); *State v Hanahan*, 111 S.C. 58, 96 S.E. 667 (manslaughter); *State v Weisengoff*, 85 W.Va. 271, 101 S.E. 450 (murder).

this as a defense would operate to free the defendant from liability for a crime caused, at least in part, by his misconduct. Yet, if his negligence in no way contributed to the crime, and if his act was not of and in itself criminal, he should be under no liability. But so far as actions founded on a violation of a statutory duty—not criminal in their nature—are concerned, whether contributory negligence is a good defense, is a matter upon which the authorities disagree. Some hold the defense good;¹⁴⁸ others that it is not.¹⁴⁹ Thus, in *Narramore v Cleveland, C. C. & St. L. Ry. Co.*,¹⁵⁰ where the question was whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changed the rule of liability of the defendant, and relieved the plaintiff from the effect of the assumption of risk which would otherwise be implied against him, we find the following enlightening discussion:

“Do a knowledge on the part of the employe that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on account of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or

¹⁴⁸ *Curtis v St. Louis, etc., R. Co.*, 96 Ark. 394, 131 S.W. 947; *Victor Coal Co. v Muir*, 20 Colo. 320, 38 Pac. 378; *Queen v Dayton Coal, etc., Co.*, 95 Tenn. 458, 32 S.W. 460; *Kilpatrick v Grand Trunk Ry. Co.*, 72 Vt. 263, 47 Atl. 827. Also see *Contributory Negligence as Defense to Actions Based on Statutes* (1912) 25 Harv. L.Rev. 463, 471.

¹⁴⁹ *Strafford v Republic Iron, etc., Co.*, 238 Ill. 371, 87 N.E. 358; *Bluedorn v Mo. Pac. Ry. Co.*, 108 Mo. 439, 18 S.W. 1103; *Greenlee v Southern R. Co.*, 122 N.C. 977, 30 S.E. 115.

¹⁵⁰ *Narramore v Cleveland, C. C. & St. L. Ry. Co.*, 96 Fed. 298.

implied from the circumstances of the employment by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence toward the servant. . . . It makes logical that most frequent exception to the application of the doctrine by which the employe who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it (cases cited). From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

"If, then, the doctrine of the assumption of risk rests really upon contract, the only remaining question is whether the courts will enforce or recognize as against a servant an agreement express or implied on its part to waive the performance of a statutory duty of the master imposed for the protection of the servant and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant 'to contract the master out' of the contract. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of contract, then the application of it in the case at bar is to do thus. . . . Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or inaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. . . . Assumption of risk and contributory negligence approximate where the danger is so obvious and

imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because, he and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view".¹⁵¹

The court, however, in *Schlemmer v Buffalo, R. & P. Ry. Co.*,¹⁵² points out the danger that lurks in the practice of allowing contributory negligence as a defense and denying the same efficacy to assumed risk:

"Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well-known case of *Farwell v Boston & Worcester R. R. Co.*, 4 Metc. 49. Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground (citation). Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment of relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the

¹⁵¹ *Ibid.*

¹⁵² *Schlemmer v Buffalo, R. & P. Ry. Co.*, 205 U.S. 1, 27 S.Ct. 407, 51 L.Ed. 681. Also note *St. Louis, etc., R. Co. v Taylor*, 20 U.S. 281, 28 S.Ct. 616, 52 L.Ed. 1061.

master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with the assumption of the risk under another name."

Nevertheless, where the statute imposes upon the defendant a specific duty:

"The violation of the statute by the defendant rendered its negligence a question of fact for the consideration of the jury. It was said in *Bourne v Whitman*, 209 Mass. 155, 95 N.E. 404, 35 L.R.A. (N.S.) 701, 'It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent.' The subject is there discussed at length and the reasonableness of this rule clearly established. The statute does not go to the extent of conclusively establishing negligence as a part of the penalty for its violation. . . . The statute does not deprive a defendant, charged in a civil action with liability arising from its violation, of the ordinary defenses except contractual assumption of risk. . . . The violation of the statute, if it has a causal connection with the injuries sustained by the plaintiff, is evidence of negligence".¹⁵³

§ 275. **Mens Rea and Specific Intent as a Defense.**—As one may gather from the foregoing two sections, the intent of the person accused of violating the mandates of a statute formulates a basis for the assertion that a good intent or the lack of an intent should excuse the accused from the penalties prescribed by the law. Whether such a defense should be accepted depends upon numerous considerations.

In the first place, the legislature has the power to define a criminal offense so that the existence of an intent to commit the offense is not necessary.¹⁵⁴ Consequently, under a statute denouncing as crimes acts *mala in se*, a criminal intent is an essential element of the offense, but where the statute denounces as crimes acts *mala prohibita*, they are in the nature of police regulations, or are intended to protect the public or to promote the general wel-

¹⁵³ *Berdos v Tremont & Suffolk Mills*, 209 Mass. 489, 95 N.E. 876.

¹⁵⁴ *Smith v State*, 223 Ala. 346, 136 So. 266; *State v Dobry*, 217 Iowa 858, 250 N.W. 702; *Common v Ober*, 286 Mass. 25, 189 N.E. 601.

fare, a criminal intent is not a necessary element, unless so declared by the legislature in apt words.¹⁵⁵

Where an intent to commit the prohibited act is an element of the crime, various matters going to show the absence of such an intent have been considered complete defenses, if proven. Among such defenses are insanity,¹⁵⁶ irresistible impulse,¹⁵⁷ coercion,¹⁵⁸ involuntary intoxication,¹⁵⁹ and the like, some of which have been discussed in preceding sections.¹⁶⁰ And obviously, it is not possible within the scope of this treatise to discuss these matters in detail. Nevertheless, it is important to keep in mind that they may be implied exceptions from the prohibitory provisions of a penal statute. In fact, some of these defenses, as we have already indicated in discussing excuses and acts justifying the disobedience of the mandates of the law, and as will also appear more fully later on in this section, are, and properly should be, valid defenses, even where a *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is not regarded as an essential ingredient of the offense.

The following language taken from *Regina v Tolson*,¹⁶¹ an English case, will give some idea of the basis for the rule which has no concern for the accused's state of mind when statutes in the nature of police regulations are involved:

"It is, however, a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing an act in question be innocent. 'It is a principle

¹⁵⁵ *State v Lindberg*, 125 Wash. 51, 215 Pac. 41. "The court fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces as criminal only its wilful doing. In the first class of cases, especially in those offenses *mala prohibita*, the law imputes the intent—in the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of the obligation and a wrongful intent to evade it, is of the essence." *Hargrove v U.S.* 67 Fed. (2) 820.

¹⁵⁶ *People v Whitman*, 266 N.Y.S. 844, 149 Misc. 159.

¹⁵⁷ *Smith v U.S.*, 59 Ap. D.C. 144, 36 Fed. (2) 548, 70 A.L.R. 654.

¹⁵⁸ See § 273, note 111, *supra*.

¹⁵⁹ *Aszman v State*, 123 Ind. 347, 24 N.E. 123.

¹⁶⁰ See *supra*, §§ 273-274.

¹⁶¹ *Regina v Tolson* (Eng.) 23 Q.B.D. 168. Also see *Sherras v De Rutzen* (Eng.) 1 Q.B. 918: "There are many cases on the subject, and it is not very easy to reconcile them. There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offense; but that presumption is liable to be displaced by the words of the statute creating the offense, or by the subject-matter with which it deals, and both must be considered."

of natural justice and of our law,' says Lord Kenyon, C. J., 'that *actus non facit reum, nisi mens sit rea*. The intent and act must both concur to constitute the crime.' *Fowler v Padget*, 7 T.R. 509, 514. The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may co-exist with respect to the same deed. There are many things prohibited by no statute—fornication or seduction for instance—which nevertheless no one would hesitate to call wrong; and the intention to do an act wrong in this sense at the least must as a general rule exist before the act done can be considered a crime. Knowingly and intentionally to break a statute must, I think, from the judicial point of view, always be morally wrong in the absence of special circumstances applicable to the particular instance and excusing the breach of the law, as for instance, if a municipal regulation be broken to save life or to put out a fire. But to make it morally right some such special matter of excuse must exist, inasmuch as the administration of justice and, indeed, the foundation of civil society rest upon the principle that obedience to the law, whether it be a law approved of or disapproved of by the individual, is the first duty of a citizen.

Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day, which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offense and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law that the person committing it had bona fide made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.

Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment and the various circumstances that may make the one construction or the other reasonable or unreasonable.

"Now in the present instance one consequence of holding that the offense is complete if the husband or wife is *de facto* alive at the time of the second marriage, although the defendant had at the time of the second marriage every reason to believe the contrary, would be that though the evidence of death should be sufficient to induce the Court of Probate to grant probate of the will or administration of the goods of the man supposed to be dead, or to prevail with the jury upon an action by the heirs to recover possession of his real property, the wife of the person supposed to be dead who had married six years and eleven months after the last time she had known him to be alive would be guilty of felony in case he should turn up twenty years afterwards. It would be scarcely less unreasonable to enact that those who had in the meantime distributed his personal estate should be guilty of larceny. It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon when dealing with a statute which literally interpreted led to what he considered an equally preposterous result: "I would adopt any construction of the statute that the words would bear in order to avoid such monstrous consequences."

"Again, the nature and extent of the penalty attached to the offense may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels . . . to imprisonment . . . or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally, as well as unintentionally done something prohibited by law.

"The case of *Reg. v Prince*, therefore, is a direct and cogent authority for saying that the intention of the legislature cannot be decided upon simple prohibitory words, without reference to other considerations."

If a person's intent will not excuse him from the penalties provided by the law for its violation, the tests suggested in the above

quotation seem highly practical. Yet, unless the prohibited act is one commonly regarded by men as wrong, the absence of an intent to violate should as a matter of technical justice completely absolve a person of guilt. Similarly, even where the accused knows that the law prohibits the performance of a prescribed act, yet, if he does all within his power to meet the requirements of the law, he should be excused from the penalties prescribed:

“As the statute is purely penal in character, it ought not to be construed as fixing an absolute liability. A failure to stop may sometimes occur, notwithstanding the utmost efforts of the engineer. In such event this omission cannot be regarded as unlawful. The law never designs the infliction of punishment where there is no wrong. The necessity of intent or purpose is always to be implied in such statutes. An actual and conscious infraction of duty is contemplated. . . . No doubt many statutes impose a penalty regardless of the intention of those who violate them, but these ordinarily relate to matters which may be known definitely in advance. In such cases commission of the offence is due to neglect or inadvertence. But even then it can hardly be supposed the offender should be held if the act were committed when in a state of somnambulism or insanity. As it is to be assumed in the exercise of proper care that the engineer has control of his train at all times, proof of the mere failure to stop makes out a *prima facie* case. But this was open to explanation, and if, from that given, it was made to appear that he made proper preparation, and intended to stop, and put forth every reasonable effort to do so, he should be exonerated.”¹⁶²

§ 276. Wrongful Conduct, Prior Equities, and Laches as Implied Exceptions from Mandatory Provisions.—It is a basic principle of our law that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statute.¹⁶³ Consequently, even though a statute may prescribe that certain results shall flow from specified acts, the mandatory language will not, or at least should not, destroy the operation of these maxims. They may be regarded as implied ex-

¹⁶² *State v Chicago, etc., Ry. Co.*, 122 Iowa 22, 96 N.W. 904.

¹⁶³ *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340.

ceptions, and therefore in accord with the intention of the legislature.

Through the application of this rule or principle of construction, a murderer should not be allowed to inherit the property of his victim.¹⁶⁴ Nevertheless, some authorities refuse to adhere to this view,¹⁶⁵ apparently upon the ground that the right to determine what is the best policy for the people is in the legislature, and that the courts cannot assume that they have a superior wisdom to that of the lawmakers, and thereby proceed to inject into a statute a clause which, in their opinion, would be more in consonance with good morals or accomplish better justice than the rule declared by the legislature.¹⁶⁶ Similarly, some cases consider the fraudulent concealment of the existence of a cause of action as a bar to the right to set up the statute of limitations as a defense,¹⁶⁷ while others refuse to adopt this view and allow the party guilty of fraud to set up the statute as a defense.¹⁶⁸ Fraud may also avoid the effect of a foreclosure,¹⁶⁹ or of a materialman's lien.¹⁷⁰

Moreover, upon considerations of justice, a prior equity,¹⁷¹ or a right taking precedence over that of another on account of the latter's laches,¹⁷² may be sufficient reasons for excepting certain transactions from the scope of a statute's mandates.

Certainly, the mandatory provisions of the law, as revealed by the few examples above given, should not be given a mandatory meaning, if avoidable by means of the principle of implied exceptions, where the mandatory meaning promotes the designs of the

¹⁶⁴ *Garwols v Bankers Trust Co.*, 251 Mich. 420, 232 N.W. 239; *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188.

¹⁶⁵ *Wall v Pfanschmidt*, 265 Ill. 180, 106 N. E. 785; *McAllister v Fair*, 72 Kan. 533, 84 Pac. 112.

¹⁶⁶ *McAllister v Fair*, 72 Kan. 533, 84 Pac. 112.

¹⁶⁷ *Rosenthal v Walker*, 111 U.S. 185, 4 S.Ct. 382, 28 L.Ed. 395; *Homer v Rish*, 1 Pick. (Mass.) 435; *Reynolds v Hennessy*, 17 R.I. 169, 20 Atl. 307, 23 Atl. 639; also see *Encking v Simmons*, 28 Wis. 272. For further cases, see 17 R.C.L. § 34.

¹⁶⁸ *Atchison, etc., R. Co. v Atchison Grain Co.*, 68 Kan. 585, 75 Pac. 1051. Also see 17 R.C.L. § 34, *Statutes of Limitations*.

¹⁶⁹ *Encking v Simmons*, 28 Wis. 272.

¹⁷⁰ *Hawkeye Lumber Co. v Day*, 203 Iowa 172, 210 N.W. 430.

¹⁷¹ *Wilhelm v Wilken*, 149 N.Y. 447, 44 N.E. 82, 32 L.R.A. 370.

¹⁷² See *Richardson v Jones (Md.)* 3 Gill & J. Co. 163, 22 Am.Dec. 293. Also see *Equity*, §§ 142-157, 10 R.C.L.

schemer, or the interests of the negligent over those of the diligent. Only by recognizing these implied exceptions, is it possible for the courts to maintain a practical legal system. Such exceptions clearly operate as a means whereby the harshness of legislation due to the inability of the legislature to foresee all possible situations which may arise in the future, is avoided. This would seem properly to be a part of the judicial power.

CHAPTER XXV

PROSPECTIVE AND RETROSPECTIVE OPERATION

- § 277. In General.
- § 278. Statutes Relating to Vested Rights.
- § 279. Some Illustrative Cases.
- § 280. Statutes Creating New Penalties and Liabilities.
- § 281. Criminal Offenses and Punishment—Ex Post Facto Laws.
- § 282. Remedial Statutes.
- § 283. Curative Statutes.
- § 284. Judicial Proceedings.
- § 285. Statutes Pertaining to Procedure and Legal Remedies, Generally.
- § 286. The Principle Exempting Procedural Statutes from the Rule Against Retroactive Operation Analyzed and Criticized.
- § 287. Remedies.
- § 288. Jurisdiction, Venue and Parties.
- § 289. Pleading.
- § 290. Evidence.
- § 291. Witnesses.
- § 292. Trial.
- § 293. Judgments.
- § 294. Appeals and Writs of Error.
- § 295. Amendatory Acts, Generally.
- § 296. Repealing Acts, Generally.

§ 277. In General.¹—Retroactive legislation is looked upon with disfavor, as a general rule,² and properly so because of its tendency to be unjust and oppressive.³ This disfavor is so great that some of

¹ For definitions, see *supra*, § 77. And see Smead, E. E., *The Rule Against Retroactive Legislation*, 20 Minn. Law Rev. 775, for a historical and analytical treatment of retroactive laws. Also note Statutes, 25 R.C.L. §§ 35-42, and 59 C.J. §§ 690-734. "Retroactive" and "retrospective" held synonymous. *Wilson v New Mexico L. Co. (N.M.)* 81 Pac. (2) 61.

² *White v U.S.*, 191 U.S. 545, 24 S.Ct. 171, 48 L.Ed. 295; *Cook v Massey*, 38 Idaho 264, 220 Pac. 1088, 35 A.L.R. 200; *Cleary v Hoobler*, 207 Ill. 97, 69 N.E. 976; *Hemsley v McKim*, 119 Md. 431, 87 Atl. 506; *Nash v Robinson*, 226 Mich. 146, 197 N.W. 522; *Sullivan v Butte*, 65 Mont. 495, 211 Pac. 301; *Strugis v Hull*, 48 Vt. 599; *Atkinson v Piper*, 181 Wis. 519, 195 N.W. 544; *Horner v Pierce County*, 111 Wash. 386, 191 Pac. 396, 14 A.L.R. 707.

³ *Rich v U.S. (U.S.)* 33 Ct. Cl. 191; *Bank v Colquitt County*, 169 Ga. 534, 150 S.E. 841; *City of Fort Worth v Morrow (Tex. Civ. Ap.)* 284 S.W. 275. Also see *Walpoe v Elliott*, 18 Ind. 258. *Corporation Comm. v Southern R. Co.*, 185 N.C. 435, 117 S.E. 563.

our state constitutions contain provisions which expressly prohibit the enactment of retrospective legislation.⁴ Nevertheless, even in the absence of constitutional provisions of this character, statutes, with but few exceptions, should, if possible, be construed so that they will have only prospective operation.⁵ Indeed, there is a presumption that the legislature intended its enactments to have this effect⁶—to be effective only *in futuro*.⁷ This is true because of the basic presumption that the legislature does not intend to enact legislation which operates oppressively and unreasonably; and retrospective laws will generally have such operation. Consequently, in the absence of any indication in the statute that the legislature intended for it to operate retroactively, it must not be given retrospective effect.⁸ If perchance any reasonable doubt exists, it should

⁴ But the federal constitution and numerous state constitutions do not directly prohibit the enactment of retroactive laws, but, on account of other provisions, make such laws invalid if they destroy vested rights, or impair contracts. And *ex post facto* laws are universally condemned, even by the federal constitution. See *Fletcher v Peck* (U.S.) 6 Cranch. 87.

⁵ *Cox v Hart*, 260 U.S. 427, 67 L.Ed. 332, 43 S.Ct. 154; *Mutual Relief Ass'n v Parker*, 171 Ark. 952, 287 S.W. 199; *O'Dea v Cook*, 176 Calif. 659, 169 Pac. 366; *Cook v Massey*, 38 Idaho 264, 220 Pac. 1088, 35 A.L.R. 200; *Beutel v Foreman*, 288 Ill. 106, 123 N.E. 270; *Thomas v Disbrow*, 208 Iowa 873, 224 N.W. 36; *Rice County School Dist. v Lyons Bd. of Educ.*, 110 Kan. 613, 204 Pac. 758; *Bowman v Geyer*, 127 Me. 351, 143 Atl. 272; *Smith v Freedman*, 268 Mass. 38, 167 N.E. 335; *Jamison v Zausch*, 227 Mo. 406, 126 S.W. 1023; *State v Lyons*, 183 Wis. 107, 197 N.W. 578.

⁶ *Brewster v Gage*, 280 U.S. 327, 50 S.Ct. 115, 74 L.Ed. 457; *State ex rel Atty. Gen. v Anderson-Tully Co.*, 186 Ark. 170, 53 S.W. (2) 17; *Vanderbilt v Atlantic, etc., R. Co.*, 188 N.C. 568, 125 S.E. 387, 52 A.L.R. 287; *Standard Chemicals, etc., Corp. v Waugh*, 231 N.Y. 51, 131 N.E. 566, 14 A.L.R. 1054; *State v Wright*, 251 Mo. 325, 158 S.W. 823; *Common. v Welfor*, 114 Va. 372, 76 S.E. 917. Also see note in 12 A.L.R. 50.

⁷ *Casner v Meriwether* (Okla.) 4 Pac. (2) 19. In fact, legislation consists of formulating rules for the future, not the past. *Oklahoma City v Dolese*, 48 Fed. (2) 734.

⁸ *U.S. v American Sugar Refining Co.*, 202 U.S. 563, 26 S.Ct. 717, 50 L.Ed. 1149; *Ducey v Patterson*, 37 Colo. 216, 86 Pac. 109; *State v Dirck*, 211 Mo. 568, 111 S.W. 1; *Ashley v Brown*, 189 N.C. 369, 151 S.E. 725. The defeat of an amendment to insert "after the year 1917" to a proposed law, did not disclose that the legislature intended that the law should take effect retroactively. *Pierce v Pierce*, 107 Wash. 125, 181 Pac. 24.

be resolved in favor of prospective operation.⁹ In other words, before a law will be construed as retrospective, its language must imperatively and clearly require such a construction.¹⁰

Moreover, in this connection, as a general rule, a statute expressed in general terms and in the present tense will be given prospective effect,¹¹ and considered applicable to conditions coming into existence subsequent to its enactment,¹² even though they were not actually known at the time of the enactment.¹³

But where an intention properly appears that the statute was intended to operate retroactively, such operation must be confined as closely as possible.¹⁴ Still, if the legislative intent clearly requires

⁹ Conklin v U.S., 21 Fed. (2) 141; rev. 27 Fed. 45; Ducey v Patterson, 37 Colo. 216, 86 Pac. 109; Marsh v Chesnut, 14 Ill. 223; McManus v Park, 287 Mo. 109, 229 S.W. 211; Sullivan v Butte, 65 Mont. 495, 211 Pac. 301; Heiskell v Lowe, 126 Tenn. 475, 153 S.W. 284; State v Cary, 186 Wis. 613, 203 N.W. 397.

¹⁰ Brewster v Gage, 280 U.S. 327, 50 S.Ct. 115, 74 L.Ed. 457; Oleson v Borthwick, 33 Hawaii 766; Home Indemnity Co. v Missouri, 78 Fed. (2) 391.

¹¹ State v Miami (Fla.) 134 So. 608.

¹² Faulkner v City of Keene (N.H.) 155 Atl. 195; Franklin v Shoemaker (Va.) 159 S.E. 100.

¹³ Common. v Welosky (Mass.) 177 N.E. 656. Nevertheless, unless the statute shows that it contemplated future development, the court can only ascribe to the legislature an intention to meet conditions existing when the act was passed. Crerar Clinch Coal Co. v Chicago, 341 Ill. 471, 173 N.E. 484. The use of general terms seems sufficient to make the statute applicable to future cases and conditions. Appeal of Cummings, 127 Me. 418, 144 Atl. 397. Also see Baker v Magnolia Petro. Co., 125 Okla. 94, 254 Pac. 26. Similarly, things not in existence at the time the law is enacted will come within its terms, where the law deals with a genus of things. Pelish Bros. v Cooper (Wyo.) 38 Pac. (2) 607. So, merely because a statute draws upon facts antecedent to its enactment for its operation, does not make it retroactive. Earle v Froedtert Grain Co. (Wash.) 85 Pac. (2) 264.

¹⁴ Gumper v Waterbury Traction Co., 68 Conn. 424, 36 Atl. 806; Thames Mfg. Co. v Lathrop, 7 Conn. 550; Styles v Byrne (Mont.) 296 Pac. 577. And see Appeal of Van Dyke (Wis.) 295 N.W. 700, that retroactive effect of a law cannot be extended beyond the time when the constitutional amendment authorizing the enactment of the law became effective.

it, complete retroactive effect must be given,¹⁵ and it does not matter how the statute or its legality is affected.¹⁶ This principle is equally applicable where the retroactive effect is required through implication.¹⁷ But, as we shall hereafter see,¹⁸ a retrospective law is not necessarily void,¹⁹ so that, as a result, it is apparent that retrospective operation may affect more than the legality of the statute.

¹⁵ *Smallwood v Gallardo*, 275 U.S. 56, 72 L.Ed. 152, 48 S.Ct. 23; *Goshen v Stonington*, 4 Conn. 209, 10 Am.Dec. 121; *Filipkowski v Springfield Fire & Marine Ins. Co.*, 206 Wis. 39, 238 N.W. 828, 78 A.L.R. 613. The words "theretofore", *U.S. Savings, etc., Co. v Miller (Tenn.)*, 47 S.W. 17, and "heretofore", *Dalby v Wolf*, 14 Iowa 228; *People v Crennan*, 141 N.Y. 239, 36 N.E. 187, will give a statute retroactive effect. The words or expressions "thereafter", *Glassford v Harshaw*, 4 N.J.L. 118, "hereafter", *Northwestern Mut. Life Ins. Co. v Seaman*, 80 Fed. 357; *Thomas v Mayo*, 56 Me. 40; *Foster v Berkey*, 8 Minn. 351; *Ihmsen v Monongahela Navig. Co.*, 32 Pa. 153; *Peters v Auditor (Va.)* 33 Grat. 368; *Realty Co. v Appolomia*, 5 Wash. 437, 32 Pac. 219, "from or after the passing of this act", *Common. v Danville Bessemer Co.*, 12 Pa. Dist. 503, "actions now pending", *Berry v Clary*, 77 Me. 482, 1 Atl. 360, will operate prospectively. Also see *Gwin v Brown*, 21 Ap. D.C. 295; *Price v Hopkins*, 13 Mich. 318; *Heiskell v Lowe*, 126 Tenn. 475, 153 S.W. 284; *Minter v Bradstreet Co.*, 174 Mo. 444, 73 S.W. 668.

¹⁶ *Gilman v Tucker*, 128 N.Y. 190, 28 N.E. 1040; *Hamilton County v Rosche*, 50 Ohio St. 103, 33 N.E. 408; *Lamb v Powder, etc., Co.*, 132 Fed. 434, 67 L.R.A. 558; *Denny v Bean*, 51 Ore. 180, 93 Pac. 693.

¹⁷ *Goshen v Stonington*, 4 Conn. 209, 10 Am.Dec. 121; *Grinder v Nelson (Md.)* 9 Gill. 299, and cases under note 15, *supra*. But see *Grimes v Norris*, 6 Calif. 621; *Oyon's Succession (La.)* 6 Rob. 504.

¹⁸ See §§ 282 and 283, *infra*, for some instances.

¹⁹ "A retrospective law may be just and reasonable; and the right of the legislature to enact one of this description, I am not specialist enough to question. I believe no person will deny, that the exercise of legislative authority, merely, and without further consequences, to confirm marriages, not duly celebrated, is valid, although clearly retrospective, and manifestly operating on the rights of individuals." *Goshen v Stonington*, 4 Conn. 209, 10 Am.Dec. 121. Also see § 255, *infra*. But note *Kimball v Rosendale*, 42 Wis. 407, "that a power somewhat arbitrary in its nature, however beneficent its exercise may sometimes be, closely borders—if not intrudes—on the judicial function." See also *Jacquins v Common. (Mass.)* 9 Cush. 279: "There is a large class of cases, where acts of legislation are passed to correct errors, and declare valid and give force and effect to the acts and proceedings of corporations and other bodies, and also to officers, in cases of irregularity in such proceedings . . . These laws are most beneficent in their purpose and design, as statutes of peace, to confirm rights, to give effect to titles, and to remove doubts. The force and effect of such statutes may depend on many circumstances; and cases arising on them must be determined according to their particular merits . . ."

And as we shall also see hereafter, in the succeeding section, in most instances, whether a statute possesses undesirable retroactive effect will depend upon whether it impairs or destroys vested rights. Where vested rights are not adversely affected, as is indicated by purely curative or remedial acts, or acts pertaining solely to procedure, there is usually no great objection to retroactive effect. Such cases may be regarded as exceptions to the general rule that statutes should not be given retroactive operation.

If a general rule is desired, perhaps no announcement is more appropriate than that made by the court in *People v Dilliard* (298 N.Y.S. 296, 302, 252 Ap. Div. 125):

"It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question applies. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation."

§ 278. Statutes Relating to Vested Rights.—The rule that statutes should not be given a construction which will give them retroactive effect, is, as already indicated, especially applicable to statutes where such a construction will either destroy or impair vested rights.²⁰ Consequently, such statutes, should be construed, if pos-

²⁰ U.S. v McPhee, 51 Colo. 425, 118 Pac. 996; *In re Seven Barrels of Wine*, 79 Fla. 1, 83 So. 627; *Seventy-Eighth Street, etc., Co. v Rosenbaum*, 182 N.Y.S. 505, 111 Misc. 577; *State v Haynie*, 169 N.C. 277, 84 S.E. 385. Also see *In re Messinger*, 29 Fed. (2) 158, 68 A.L.R. 1205; *Campbell v N.Y. Evening Post*, 245 N.Y. 320, 157 N.E. 153. Indeed, whether a statute impairs vested rights seems, in some cases, to be the determining factor whether the statute is bad because of its retroactive operation. *Sayer v Wisner*, 8 Wend. (N.Y.) 661. And see *Westervelt v People*, 13 N.Y. 378; *Conway v Cable*, 37 Ill. 82; *Drehman v Stifel*, 41 Mo. 184; *Arnold v Industrial Comm.*, 314 Ill. 251, 145 N.E. 342, 40 A.L.R. 1470; *Runk v Knight*, 187 N.Y.S. 747; *Williams v Johnson*, 30 Md. 500, that the constitutional prohibition against the enactment of retrospective legislation applies only to a law infringing or divesting vested rights. But authority exists which recognizes the need for certain retroactive laws, even though they impair vested interests, if promotive of justice and the general good. *Goshen v Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Boston v Cummins*, 16 Ga. 102, 60 Am. Dec. 717. What is a vested right? "Every right resting in perfect obligation is vested; and such a right being conferred by statute, renders it no more sacred than if it were sanctioned merely by law of nature, or the common law." *Butler v Palmer* (N.Y.) 1 Hill 324.

sible, as applying only to future cases;²¹ that is, as having no retrospective operation.²² In fact, here too, prospective operation is to be presumed.²³ This rule has been applied to statutes abolishing community property,²⁴ creating separate estates for married women,²⁵ modifying the nature and tenure of estates through inheritance,²⁶ interfering with contractual obligations or impairing the validity of contracts already in existence,²⁷ and other statutes of a similar nature.²⁸

The rule is founded on the proposition that, since every citizen is presumed to know the law and to enter into business engagements in accordance with its provisions, it would be unjust, even where the legislature has the power to enact a law with retroactive effect, unless it is clear that such is the legislature's purpose, to allow the enactment of legislation to operate in retrospection.²⁹ Yet, if the

²¹ *Southwestern Coal etc. Co. v McBride*, 185 U.S. 499, 46 L.Ed. 1010, 22 S.Ct. 763; *Meade v Lamarche*, 134 N.Y.S. 479, 150 Ap. Div. 42; *Cairns v Spencer*, 87 Pa. Super. 126. Also see *People v Perłowski*, 251 Ill. Ap. 506. *Davidson v Gaston*, 16 Me. 230; *Runk v Knight*, 187 N.Y.S. 747, 196 Ap. Div. 99; *Goillotel v Mayor etc. of N.Y.*, 87 N.Y. 441.

²² *People v Dillard*, 298 N.Y.S. 296, 252 Ap. Div. 125.

²³ *Ibid.*

²⁴ *In re Chavez*, 149 Fed. 73, 80 C.C.A. 451.

²⁵ *Rose v Rose*, 104 Ky. 48, 46 S.W. 524, 41 L.R.A. 353; *Leete v State Bank of St. Louis*, 115 Mo. 184, 21 S.W. 788; *Quigley v Graham*, 18 Ohio St. 42; *Hershizer v Florence*, 39 Ohio St. 516.

²⁶ This is the rule where the estate has already vested. *Crane v Reeder*, 21 Mich. 24; *Shell v Matteson*, 81 Minn. 38, 83 N.W. 491; *In re Pell's Estate*, 171 N.Y. 48, 63 N.E. 789, 57 L.R.A. 540. Also see *Sorenson v Rasmussen*, 114 Minn. 324, 131 N.W. 325.

²⁷ *Hoyt Metal Co. v Atwood*, 289 Fed. 453; *Plumb v Sawyer*, 21 Conn. 351; *Roundtree v Baker*, 52 Ill. 241; *Murrell v Jones*, 40 Miss. 565; *Rigler v Fidelity Bldg. & Loan Assoc. (N.D.)* 269 N.W. 58.

²⁸ *Barnitz v Beverly*, 163 U.S. 118, 41 L.Ed. 93, 16 S.Ct. 1042 (right of redemption); *Winfree v Northern Pac. R. Co.*, 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed. 518 (employer's liability); *Lease v Owen Lodge*, 83 Ind. 498 (mortgage lien); *McGirr v Pritchard*, 258 Ill. Ap. 467 (statute of limitations); *Reed v Swann*, 133 Mo. 100, 34 S.W. 482, (right of redemption); *Cote v Bachelder-Worchester Co.*, 85 N.H. 444, 160 Atl. 101, 82 A.L.R. 1239 (workmen's compensation). For statute prescribing grounds for divorce and operating retrospectively, see *Barrington v Barrington*, 200 Ala. 315, 76 So. 81. Also see *Greenlaw v Greenlaw*, 12 N.H. 200.

²⁹ *U.S. v McPhee*, 51 Colo. 425, 118 Pac. 996; *Murphy v Boston & Maine R.R.*, 77 N.H. 573, 94 Atl. 967. Also see *Massa v Natri (Conn.)* 3 Atl. (2) 839; *People ex rel. D. W. Griffith, Inc. v Loughman*, 249 N.Y. 369, 164 N.E. 253.

intent clearly appears that the statute is to operate retrospectively, even though thereby the statute becomes invalid,³⁰ the court must give it the effect intended by the legislature.³¹

The identification of the principle herein treated with vested rights resulted from the expansion of the principle to make it include a prohibition against laws which commenced on the date of enactment and which operated *in futuro*, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of the enactment of such laws. Prior to this development, the principle had been invoked against retroactive laws which operated only on acts from a time before the passage of those laws or on cases arising during this past time.³²

§ 279. Some Illustrative Cases.—An examination of several typical cases will shed additional light upon the application of the rule with reference to vested rights. For instance, in the first place, it is highly essential that the difference between rights, and the remedies or procedure connected therewith, be kept in mind. As the court said in *Aetna Insurance Co. v O'Malley* (— Mo. —, 118 S.W. (2) 3):

“No person can claim a vested right in any particular mode of procedure for the enforcement of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If, before final decision, a new law as to procedure is enacted, it must from that time govern and regulate the proceedings.”

³⁰ Some courts have held that retroactive laws which impaired vested rights were contrary to justice, or constituted violations of the social compact, or of the very principles upon which our government was based, or were not properly an exercise of the legislative power at all. A retroactive statute not being law, its enactment was beyond the power of the legislature. *Gum v Weissenberg School Dist.*, 57 Pa. St. 433; and see *Merrill v Sherburne*, 1 N.H. 199.

³¹ *Spitley v Frost*, 15 Fed. 299, rev. on another ground, 121 U.S. 552, 30 L.Ed. 1010, 7 S.Ct. 1129; *Western Pac. R. Co. v Baldwin* 89 Fed. (2) 269; *Hiatt v Nobes* (Ind.) 8 N.E. (2) 139; *Manchester v State*, 103 N.Y. 547, 9 N.E. 313; *Sterrett v White Pine Sash Co.*, 176 Wash. 663, 30 Pac. (2) 665.

³² See *Smead, E. E.*—The Rule against Retroactive Legislation, 20 Minn. L.Rev. 775 (1936). And note *Society for the Propagation of the Gospel, etc. v Wheeler* (U.S.) 2 Gall. C.C. 105, and *Bacon v Callender*, 6 Mass. 303, 309.

Yet, in numerous instances, the right and the procedure connected with it may be so closely related that the alteration or abrogation of the latter will operate to impair or destroy the former:

"A purely statutory right may be, by the power conferring it, made to depend upon a new condition, or taken away entirely. A statute of limitations, strictly so-called, operates on the remedy directly. A statute changing the condition of a right of action for damages given by statute, is a condition precedent to the right to such damages, hence acts directly on the right, and is not a statute of limitations in the ordinary legal sense of the term. Such rights are not protected against impairment, by constitutional guaranties, while rights which exist independent of the statute are so protected. A law changing the time for, or conditions of, the enforcement of a common-law right, is in the nature of a statute of limitations which, if of such a character as to materially affect the right itself, is within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law. A change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement, which does not allow a reasonable time within which to commence an action for such enforcement or comply with the new condition, is within the inhibition mentioned and is void as to existing rights, otherwise valid." *Relyea v Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N.W. 412.

But considerations of public good and public justice have been regarded as sufficient reasons for upholding retroactive legislation of a curative nature, even though certain vested rights were thereby impaired:

"The retrospection of the act is indisputable, and equally so is its purpose to change the legal rights of the litigating parties

"It is universally admitted, and unsusceptible of dispute, that there may be retrospective laws impairing vested rights, which are unjust, neither according to sound legislation, nor the fundamental principles 'of the social compact'. If, for example, the legislature should enact a law, without any assignable reason, taking from A. his estate, and giving it to B., the injustice would be flagrant, and the act would produce a sensation of universal insecurity.

"On the other hand, laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principles, and highly promotive of the general good, have often been

passed, and as often approved. In the case before us, the defendants have expressly conceded, that the law in question is valid, so far as respects the persons *de facto* married, and their issue. But, in that event, would it not have a retrospective operation on vested rights? The man and woman were unmarried, notwithstanding the formal ceremony which passed between them, and free, in point of law, to live in celibacy, or contact matrimony with any person, at pleasure. It is a strong exercise of power, to compel two persons to marry, without their consent; and a palpable perversion of strict legal right. At the same time, the retrospective law, thus far directly operating on vested rights, is admitted to be unquestionably valid, because it is manifestly just.

“I very much question, whether there is an existing government, in which laws of a retroactive nature and effect, impairing vested rights, but promotive of justice and the general good, have not been passed. In England, such laws frequently have been enacted; and the act of 26 Geo. 2. cap. 33, giving validity to former marriages, celebrated in any church or public chapel, is precisely of this description. Doug. 661, note. In the neighboring state of Massachusetts, there have been many such laws (*Foster et al. v Essex Bank*, 16 Mass. from 257 to 261, 8 Am. Dec. 135) and the interposition of our own legislature, in similar cases, is familiar to gentlemen of the profession. The judgments of courts, when by accident a term has fallen through, have been established; the doings of a committee and conservator, not strictly legal, have been confirmed; and other laws have been passed, all affecting vested rights; but being incontrovertibly just, no disapprobation has ever been expressed. Whoever found fault with the law, authorizing the commissioners to require suitable railings on turnpike roads, and yet, in respect of all anterior grants, the act was retrospective and put on the companies a new, and perhaps, an expensive burden. It, however, was just, demanded by the public good, and the subject of universal acquiescence.”^{32a}

§ 280. Statutes Creating New Penalties and Liabilities.—In accord with the general principles already discussed,³³ statutes which create new liabilities in connection with past transactions should

^{32a} *Town of Goshen v Inhabitants of Stonington*, 4 Conn. 209, 10 Am. Dec. 121. Also see *U.S. v The Peggy (U.S.)* 1 Cranch. 103, 2 L.Ed. 49 (individual rights sacrificed for national purposes in great national concerns (war); *Jacquins v Common. (Mass.)* 9 Cush. 279.

³³ See § 277, *supra*.

not be given a retroactive operation.³⁴ This rule has been applied to enactments imposing penalties on delinquent taxpayers,³⁵ statutes creating new principles concerning the liability of employers,³⁶ and those giving an action for wrongful death.³⁷ Congress, has, however, been held able to impose taxes retrospectively,³⁸ notwithstanding the fact that retroactive effect, even though it pertains to tax laws, does not seem desirable, because of the inherent oppressiveness of retroactive legislation.

But the power to levy taxes retrospectively is not without its limitations, as is indicated in *Diamond Match Co. v Tax Commission* (— Md. —, 200 Atl. 365):

“The levy of a tax by the state is not within the inhibition of the Federal Constitution merely because the statute which

³⁴In *re Parker's Estate*, 200 Calif. 132, 251 Pac. 907, 49 A.L.R. 1025; *People ex rel. D. W. Griffith, Inc. v Loughman*, 249 N.Y. 369, 164 N.E. 253; *Micamold Radio Corp. v Beedie*, 282 N.Y.S. 77, 156 Misc. 390; *Duggers v Mechanics etc. Ins. Co.*, 95 Tenn. 245, 32 S.W. 5, 28 L.R.A. 796; *State v Bancroft*, 148 Wis. 124, 134 N.W. 330. Not only may statutes create completely new rights, but old rights which have become barred or have died may be revived; *Danforth v Groton Water Co.*, 178 Mass. 472, 59 N.E. 1033; *Woodward v Winehill*, 14 Wash. 394, 49 Pac. 860, where the legislative intention to do so is clear. *Fullerton-Kruger Lumber Co. v Northern Pac. R.*, 266 U.S. 435, 45 S.Ct. 143, 69 L.Ed. 367. Also see (1925) 38 Harvard L.Rev. 836. For the power of the legislature to revive a cause of action barred by the statute of limitations, see 36 A.L.R. 1316, and for enlargement of statutory period of limitations, see 46 A.L.R. 1101.

³⁵*Bartruff v Remey*, 15 Iowa 257.

³⁶*Plummer v Northern Pac. Ry. Co.*, 152 Fed. 206; *State v General Acc. Assur. Corp.*, 134 Minn. 21, 158 N.W. 715; *Givens v Southern Pac. R. Co.*, 94 Miss. 830, 49 So. 180. Also see *Cote v Bachelder-Worcester Co.*, 85 N.H. 444, 160 Atl. 101, 82 A.L.R. 1239; *Foster v Department of Labor*, 161 Wash. 54, 296 Pac. 148, 73 A.L.R. 1012, where this rule was applied to Workmen's Compensation Acts. But apparently *contra*, see *Marker v Industrial Comm.*, 84 Utah 587, 37 Pac. (2) 785, 98 A.L.R. 722.

³⁷*Kelley v Boston etc. R. Co.*, 135 Mass. 448. Also see *Reinhardt v Fritzsche*, 69 Hun. 565, 23 N.Y.S. 958, for damages, generally.

³⁸*Stockdale v The Atlantic Ins. Co.*, 20 Wall. (U.S.) 323, 33 L.Ed. 348; also see Note 44 L.R.A. (N.S.) 420. And for retroactive operation of a succession tax, see *Schwab v. Doyle*, 258 U.S. 529, 42 S.Ct. 391, 66 L.Ed. 747, 26 A.L.R. 1454, and note in 44 Harv. L.Rev. 103 (1931). For interpretation of excise taxes, see *Amberg, Retroactive Excise Taxation*, 37 Harv. L.Rev. 691 (1924). For Retrospective Abrogation of Exemptions, see *Welch v Henry* (U.S.) 59 S.Ct. 121, and note in 24 Wash. U. Law Quart. 269, *Neuhoff, Retrospective Tax Laws* (1935), 21 St.L. Law Rev. 1.

imposed it made it retroactive in its operation (cases cited). Nor is there in the Constitution of Maryland any provision against retrospective laws, except those which relate to the imposition of a criminal penalty (cases cited). So the levy of a franchise tax may have retroactive effect on the basis of the issued, outstanding, and subscribed capital stock of a domestic corporation of a date before the day of the passage of the statute making the levy, so long as the statute does not interfere with vested rights or impair contractual obligations."

The true status of the rule would seem best expressed in *People ex rel. D. W. Griffith, Inc. v Loughman* (249 N.Y. 369, 164 N.E. 257), where a tax, imposed on foreign corporations for the privilege of entering the state to do business, was held inapplicable to those already doing business in the state:

"The general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in another way."

In fact, this would seem the proper view to take with reference to any law which imposes new penalties or liabilities, as is indicated in *Massa v Nastri* (— Conn. —, 3 Atl. (2) 839):

"The rule that laws are not to be construed as applying to cases which arose before their passage is applicable when to disregard it would impose an unexpected liability that if known might have caused those concerned to avoid it. . . . To accord the repeal . . . the effect of relegating the present parties to the common law rule as it obtained before the passage of that statute and after its repeal would impose upon the defendants a liability to the plaintiff guest to which they were not subject at the time of the occurrence upon which the action is based, in that they would be liable for the consequences of ordinary negligence instead of only for heedlessness or reckless disregard of the rights of others, and would deprive them of an exemption, in that sense and to that extent from, liability. A legal exemption from or limitation upon liability stands on quite as high ground as a right of action. If the law at the time the right of action accrued is such that a plaintiff may claim it as a vested right, equally a defendant has an equivalent vested right to an exemption."

§ 281. Criminal Offenses and Punishment—*Ex Post Facto* Laws.—Neither should a penal or criminal statute be given retro-

active effect, if avoidable.³⁹ If such effect is given, the statute obviously falls within the prohibition against *ex post facto* legislation.⁴⁰ Nor should the statute be given retroactive operation, unless its language clearly makes such a construction necessary, even though it favors the defendant, either by relieving him wholly or partially from punishment previously provided for, or by condoning the offense created by the former law.⁴¹ But if the criminal statute is subject to a strict construction, as it generally is, it would seem that where retroactive effect favors the defendant, the statute should be liberally construed in favor of retroactivity.

Within relatively recent years, the question has frequently arisen whether a statute which alters the method of inflicting the death penalty after the defendant has been convicted and sentenced to death by one method, falls within the inhibition against *ex post facto* legislation. The principle seems to be well settled that such

³⁹ U.S. v Starr, Fed. Cas. No. 16,379; Eacock v State, 169 Ind. 488, 82 N.E. 1039; State v Coley, 114 N.C. 879, 19 S.E. 705. Also see Northern Pac. Ry. Co. v U.S., 213 Fed. 162, 129 C.C.A. 514, aff'd 242, U.S. 190, 37 S.Ct. 22, 61 L.Ed. 648. Habitual criminal acts are not *ex post facto* legislation. People v D. A. Phillippo, 220 Calif. 620, 32 Pac. (2) 962; Cross v State, 119 So. 380, 96 Fla. 768; Kelley v State, 204 Ind. 612, 185 N.E. 453; State v Norris, 203 Iowa 327, 210 N.W. 922; Common. v Graves, 155 Mass. 163, 29 N.E. 579, 16 A.L.R. 256; People v Palm, 245 Mich. 396, 223 N.W. 67. But statutes relating solely to remedies, even on past judgments, may properly operate retroactively. Jacquins v Common. (Mass.) 9 Cush. 279. And the term "*ex post facto*" is confined to criminal cases. People v Chicago, etc., R. Co., 323 Ill. 536, 154 N.E. 468.

⁴⁰ Earbaugh v U.S. 173 Fed. 433, 97 C.C.A. 663. "Ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed, or which deprives the accused of any substantial right or immunity, possessed by him before its passage, as to prior offenses. U.S. ex rel. Umbenhowar v McDonnell, 11 Fed. Supp. 1014. And note the following language in Jacquins v Common. (Mass.) 9 Cush. 279: "Ex post facto laws are understood to be laws to punish, as criminal or penal, acts which were not criminal, or not offenses, at the time they were done, or which if criminal or penal were not subject to penalties so high, or to punishment so severe, as those affixed to them by the *ex post facto* law. The reason these laws are so universally condemned is that they overlook the great object of all criminal law, which is to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime, to prevent them from committing it." But is this the real reason for the condemnation? Rather is it not the inherent harshness or unjust operation of such laws?

⁴¹ State v Startup, 39 N.J.L. 423.

a statute is not within the inhibition, especially where the new method of inflicting the penalty is more humane. The reasoning back of this view will be found in the following language taken from a representative case:^{41a}

“In one of the early decisions of the United States Supreme Court, *Calder v Bull*, 3 Dall. 368, 1 L.Ed. 648, the definition of the term *ex post facto*, as used there, and this has been followed since by practically all the courts and law writers, is in this language:

‘1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.

2nd. Every law that aggravates a crime or makes it greater than it was, when committed.

3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.’

The only one of these four subdivisions that could be considered in connection with the matter confronting us here is the third which refers to laws changing the punishment for a crime. The amendment in question, however, does not even attempt to do this but is predicated upon the fact that first degree murder is still punishable by death, that is, when the jury, or the judge upon a plea of guilty, decides to impose it; all it does is to change the method of inflicting that penalty. And it is clear from a reading of the authorities that a law which does no more than this, so long as it has the effect of mollifying the rigor of the old method of execution is not an *ex post facto* law. Such was the holding of the court in *Calder v Bull*, *supra*. In discussing this question it said:

‘But I do not consider any law *ex post facto*, within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the

^{41a} *Hernandez v State (Ariz.)* 32 Pac. (2) 18. Accord: *Shaughnessy v State*, 43 Ariz. 445, 32 Pac. (2) 337 (substitution of death by lethal gas in place of death by hanging). Also see *Malloy v State*, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905, and *Woo Dak San v State*, 36 N.M. 53, 7 Pac. (2) 940. And note *People v Roper*, 259 N.Y. 635, 182 N.E. 213, mot. den. 259 N.Y. 170, 181 N.E. 88, where a statute reducing the maximum sentence for first degree robbery was held not to be *ex post facto*.

punishment, or change the rules of evidence for the purpose of conviction.' ”

In other words, where the punishment is altered, and, consequently, in the light of human experience and morality, favors the defendant, he cannot complain of the retroactive effect of the law which changes the punishment. Obviously, since the condemnation of *ex post facto* legislation is founded on its inherent harshness, the basis of the condemnation disappears where the alteration operates in favor of the accused or condemned person.

§ 282. **Remedial Statutes.**—Even remedial statutes may be subject to the principles heretofore discussed,⁴² opposing any construction which will give the enactment retrospective operation.⁴³

⁴² See § 277, *supra*. A remedial statute is one which confers a remedy, and a remedy is the means employed to enforce a right or redress an injury. *Washington Nat. Ins. Co. v. McLemore* (La. Ap.) 163 So. 773.

⁴³ *Eddy v. Morgan*, 216 Ill. 437, 75 N.E. 174; *Northern Pac. Ry. Co. v. Concannon*, 75 Wash. 591, 135 Pac. 652, but reversed on other grounds, 239 U.S. 382, 36 S.Ct. 156, 60 L.Ed. 342; *Thomas v. Higgs*, 68 W.Va. 152, 69 S.E. 654; *Ferguson v. Ferguson* (Va.) 192 S.E. 774. But note *Paulsen v. Reinecke* (La.) 160 So. 629, that the rule that laws will be construed to operate prospectively, unless a contrary intent is clearly shown, does not apply to acts purely remedial. Also see *Winfree v. Northern Pac. R. Co.*, 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed. 518; “Plaintiff, to support his contention that the act of congress has retroactive effect, presents a very elaborate argument based on the extensive effect which courts have given to remedial statutes, applying them, it is contended, to the past as to the future. The court of appeals met the argument, as we think it should be met, by saying that statutes that had received such extensive application were ‘such as were intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings or to give effect to acts and contracts of individuals according to the intention thereof.’ It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to effect what has happened unless, explicit words be used or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of congress and the act only has given a more efficient and more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. . . . Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law.” Consequently, the act relating to the liability of common carriers by railroads to their employees, was refused application where the employee’s death occurred after the law’s enactment.

Yet, since remedial statutes are usually looked upon with favor by the courts,⁴⁴ they should be liberally construed.⁴⁵ But there appears to be considerable confusion in the cases with reference to giving remedial acts retrospective effect through construction. If the rule of liberal construction is to be applied, as it obviously should, then any doubt should be resolved in favor of retrospective operation, if such operation does not destroy or disturb vested rights,⁴⁶ impair the obligations of contracts,⁴⁷ create new liabilities,⁴⁸ violate due process of law or contravene some other constitutional provision,⁴⁹ and if such operation will carry out the intent of the legislature as ascertained through the application of the principles of liberal construction.^{49a} In other words, a statute relating to remedial law

⁴⁴ *Globe Indemnity Co. v. Martin*, 214 Ala. 646, 108 So. 761.

⁴⁵ *Haskel v Burlington*, 30 Iowa 232.

⁴⁶ *Fisher v Hervey*, 6 Colo. 16; *Haskell v Burlington*, 30 Iowa 232; *People v Spicer*, 99 N.Y. 225, 1 N.E. 680. Also see *State v Kansas City etc. Co.*, 117 Ark. 606, 174 S.W. 248; *Atkinson v Atkinson*, 203 N.Y.S. 49, 207 Ap. Div. 660; *Richardson v Cook*, 37 Vt. 599; *State v Pors*, 107 Wis. 420, 83 N.W. 706, 51 L.R.A. 917, "Legislative acts remedial in their nature are frequently construed so as to act retrospectively, and amendments to existing laws and to laws to strengthen legislative effort to correct abuses are to be applied so as to suppress the mischief and advance the remedy. Such remedial statutes may be of a retrospective nature when they do not impair contracts or disturb vested rights." *Levy v Birnschein*, 206 Wis. 486, 240 N.W. 140, 141. Consequently, a statute requiring the plaintiff in an action for a real estate commission to allege and prove he was duly licensed, was held binding even though the statute became effective after the suit had been filed. But statutes even though remedial, should be construed as prospective only, where a new right is established. *Leivittes & Sons v Perlow*, 254 Ap. Div. 94, 3 N.Y.S. (2) 916.

⁴⁷ *Ibid.*

⁴⁸ *Leivittes & Sons v Perlow*, 254 Ap. Div. 94, 3 N.Y.S. (2) 916; *Hamilton County v Rosche*, 50 Ohio St. 103, 33 N.E. 408, 19 L.R.A. 584. Also see cases under note 46, *supra*.

⁴⁹ *St. Joseph's Hospital v Maternity Hospital (Wis.)* 272 N.W. 669.

^{49a} For such principles, see §§ 224 and 233, *supra*. But note *Eddy v Morgan*, 219 Ill. 437, 75 N.E. 174, and *Becker v Green County*, 176 Wis. 120, 184 N.W. 715, 186 N.W. 584, that doubt must be resolved against retrospective effect. Such a view, however, would seem justifiable or desirable only where retrospective operation would impair contracts, destroy vested rights or create new liabilities. See *Conn. Mut. Life Ins. Co. v Talbot*, 113 Ind. 373, 14 N.E. 586, and *Ex parte Buckley*, 53 Ala. 42. Also note *Edelstein v Carile*, 33 Colo. 54, 78 Pac. 680; *Fowler v Lewis, Adm.*, 36 W.Va. 112, 14 S.E. 447.

may properly, in several instances, be given retrospective application.⁵⁰

§ 283. **Curative Statutes.**—Acts of this character are obviously retroactive,⁵¹ and hence entitled, as a general rule, to retrospective operation.⁵² Being retroactive in their very nature, they will not usually be given any prospective effect.⁵³ Being subject to a liberal construction, any doubt should be resolved in favor of retrospective operation.⁵⁴

Nevertheless, there are even limitations on the extent of the retroactive operation of curative acts. Obviously, they cannot violate provisions of the constitution.⁵⁵ Nor should they interfere

⁵⁰ *The Pocahontas*, 20 Fed. Supp. 1004.

⁵¹ *McFaddin v Evans-Snider-Buel Co.*, 185 U.S. 505, 22 S.Ct. 758, 46 L.Ed. 1012; *Brannon v Henry*, 175 Ala. 454, 57 So. 967; *Farmers Savings etc. Assoc. v Berger*, 70 Ark. 613, 69 S.W. 57; *Hall v Fairchild-Gilmore-Wilton Co.*, 66 Calif. Ap. 615, 227 Pac. 649; *McSurely v McGrew*, 140 Iowa 163, 118 N.W. 415; *Snidow v Montana Home*, 88 Mont. 337, 292 Pac. 722; *Conde v Schenectady*, 164 N.Y. 258, 58 N.E. 130; *Hunt County v Rains County (Tex. Civ.Ap.)* 7 S.W. (2) 648; *Fairmont Wall Plaster Co v Nuzum*, 85 W.Va. 667, 102 S.E. 494. Such statutes, although retroactive, are viewed as desirable and necessary. *Bell v Perkins (Tenn.)* 14 Am. Dec. 745; *People ex rel. Pells v Supervisors*, 65 N.Y. 300. Is not this the reason for excepting curative acts from the operation of the rule against retrospective operation? *Teaco v Forbes*, 228 U.S. 549, 33 S.Ct. 585, 57 L.Ed. 960; *Grim v Weissenberg School Dist.*, 57 Pa. St. 433.

⁵² *Ferry v Campbell*, 110 Iowa 290, 81 N.W. 604, 50 L.R.A. 92; *Snidow v Montana Home*, 88 Mont. 337, 292 Pac. 722; *Brand v Multomah County*, 38 Ore. 79, 60 Pac. 390, 62 Pac. 209, 50 L.R.A. 389. But not in contravention of legislative intention. *Bernier v Becker*, 37 Ohio St. 72.

⁵³ *People v Chicago etc. R. Co.*, 305 Ill. 567, 137 N.E. 392; *Jones v Berkshire*, 15 Iowa 248; *Snidow v Montana Home*, 88 Mont. 337, 292 Pac. 722; *Bernier v Becker*, 37 Ohio St. 72; *Marsh v Nelson*, 101 Pa. 51; *Hunt County v Rains County (Tex. Civ. Ap.)* 7 S.W. (2) 648. But see *Fairmont Wall Plaster Co. v Nuzum*, 85 W.Va. 667, 102 S.E. 494.

⁵⁴ See § 251, *supra*. In *Mote v Town of Carlisle (Iowa)* 233 N.W. 695, the provision of a curative act, which stated that the act shall not affect pending litigation, was held to be in the nature of a proviso, and entitled to effect, although it rendered the act meaningless.

⁵⁵ *Town of Walton v Adair*, 97 N.Y.S. 868, 111 Ap. Div. 817. Also see *Martin v South Salem Land Co.*, 94 Va. 28, 26 S.E. 591.

with or destroy vested rights of third parties.⁵⁶ They should be used only where the defect sought to be corrected resulted from a failure to comply with some formality which could have been originally dispensed with by the legislature,⁵⁷ but which, under existing law, was a material requirement.⁵⁸ Since a true curative act is retroactive in operation, it cannot affect any act done after its enactment,⁵⁹ but it will, as a general rule, make the act subject to the curative enactment, valid from its very beginning.⁶⁰ For instance, where a curative act became effective during the pendency of an appeal, writ of error, or motion for a rehearing, the defect sought to be cured is cured the same as if the act had become effective before the action was instituted.⁶¹ On the other hand a curative

⁵⁶ *Inhabitants of Town of Goshen v Inhabitants of Town of Stonington*, 4 Conn. 209; *Marsh v Chesnut*, 14 Ill. 223; *Merchants Bank v Ballou*, 98 Va. 112, 32 S.E. 481; and see *McDowell v Rockwood*, 182 Mass. 150, 65 N.E. 65; *Luther v Luther*, 22 Pa. Dist. 548; *Kurtzman v Blackwell*, 21 Tex. Civ. Ap. 22, 51 S.W. 659. Also note Cooley, T. M. *The Limits to Legislative Power in the Passage of Curative Laws* (1881), 12 Cent. L.Jr. 3, 4; "If one curative law may be held good, and another not good, the result is that the validity of legislation in this class of cases must depend upon the view the court may take of its justice. If, in the opinion of the court, it operates unjustly, it must be held void; but if not, it may be upheld." Hence, curative laws which the court has considered injurious, either because they destroyed vested rights or were unjust for other reasons, have been held subject to the rule against retrospective operation. See *Welch v Wadsworth*, 30 Conn. 149; *Conway v Cable*, 37 Ill. 82; also *Rosenthal v Liss* (Mass.) 169 N.E. 142, where the act cured mistakes in the registration of motor vehicles.

⁵⁷ *Taylor v Tennessee & Florida Land Co.*, 71 Fla. 651, 72 So. 206; *Board of Comrs. v Fahlor*, 132 Ind. 426, 31 N.E. 1112; *Wright v Johnson*, 108 Va. 855, 62 S.E. 948; *Single v Marathon County Supervisors*, 38 Wis. 363. And see *People v Van Nuys Lighting Dist.*, 173 Calif. 792, 162 Pac. 97.

⁵⁸ *Taylor v Tennessee & Florida Land Co.*, 71 Fla. 651, 72 So. 206. Also see cases under note 57, *supra*.

⁵⁹ *Snidow v Montana Home*, 88 Mont. 337, 292 Pac. 722.

⁶⁰ *Brannan v Henry*, 175 Ala. 454, 57 So. 967; *King v Course*, 25 Ind. 202; *Malone v Peay*, 159 Tenn. 321, 17 S.W. (2) 901. But see *People v O'Neal*, 51 Calif. 91, that the validity became effective only from the date of passage of the curative act. Logically, this view may be justified, although from a practical standpoint the general view seems preferable.

⁶¹ *Lyford v Willmer* (Tex. Comm. Ap.) 34 S.W. (2) 854. But where the right of appeal has expired, and the judgment has become final, the curative act does not affect the judgment. *People ex rel. Harding v Wiley*, 289 Ill. 173, 124 N.E. 385. Also see *Malone v Peay*, 159 Tenn. 321, 17 S.W. (2) 901.

statute cannot validate an act originally done without authority.⁶²

In the discussion at the beginning of this chapter, it is pointed out that all retrospective laws are not invalid and suggested that curative acts fall within this category. A few illustrations will reveal that considerations of public policy, public good, and the like, may play an important part in exempting curative acts from the general rule which forbids a construction that gives a statute retroactive effect, even though vested rights may thereby be impaired. Thus, in *Goshen v Inhabitants of Stonington* (4 Conn. 209, 10 Am. Dec. 121), the legislature enacted a statute rendering valid, to all intents and purposes, all marriages performed by an ordained minister, qualified and empowered to celebrate them, according to the forms and usages of any religious society or denomination. In upholding the statute, the court said:

"The act of May, 1820, was intended to quiet controversy, and promote the public tranquility. Many marriages had been celebrated, as was believed, according to the prescriptions of the statute. On a close investigation of the subject, under the prompting scrutiny of interest, it was made to appear that there had been an honest misconstruction of the law; that many unions, which were considered as matrimonial, were really meretricious; and that the settlement of children, in great numbers, was not in the towns, of which their fathers were inhabitants, but in different places. To furnish a remedy coextensive with the mischief, the legislature have passed an act, confirming the matrimonial engagements supposed to have been formed, and giving to them validity, as if the existing law had precisely been observed. The act intrinsically imports, that the legislature considered the law of May, 1820, to be conformable to justice, and within the sphere of their authority. It was no violation of the constitution; it was not a novelty; such exercises of power having been frequent, and the subject of universal acquiescence; and no injustice can arise from having given legal efficacy to voluntary engagements, and from

⁶² *Hodges v Snyder*, 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819; *People v Van Nuys Lighting Dist.*, 173 Calif. 792, 162 Pac. 97; *Montgomery v Town of Branford*, 107 Conn. 697, 142 Atl. 574. Such an exemption will, however, be strictly construed. *New York etc. Land Co. v Weidner*, 169 Pa. 359, 32 Atl. 557. "Perhaps, the true limit of the curative power of the legislature, as gathered from all the authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void; defects of execution only, not of authority or jurisdiction; and is confined to defective proceedings under previous legislative authority. It is true that many most respectable authorities do not set so narrow a limit to the power." *Kimball v Town of Rosendale*, 42 Wis. 407.

accompanying them with the consequences, which they always impart."

Similarly, in *Jacquins v Commonwealth* (9 Cush. (Mass.) 279), the court assumed the same attitude:

"There is a large class of cases, where acts of legislation are passed, to correct errors, and declare valid and give force and effect to the acts and proceedings of corporations and other bodies, and also to officers, in cases of irregularity in such proceedings. . . . These laws are most beneficent and design, as statutes of peace, to confirm rights, to give effect to titles, and to remove doubts."

§ 284. Judicial Proceedings.—While pending litigation may be exempted from the operation of curative statutes,⁶³ in many instances it is not.⁶⁴ But, in either case, however, a number of problems arise. Moreover, there is also considerable confusion in the decisions pertaining to their solutions. For instance, where pending litigation is not exempt, some courts have held that the curative act will apply even after the case has been appealed,⁶⁵ and others that it will not apply to any case wherein judgment has been rendered in the lower court.⁶⁶ Perhaps the best rule is that a final judgment cannot be affected.⁶⁷ Or stated conversely, until the judgment is final, it is subject to the power of the legislature to enact curative legislation.⁶⁸

⁶³ *Mote v Town of Carlisle* (Iowa) 233 N.W. 695; *New York Land Co. v Weidner*, 169 Pa. 359, 32 Atl. 557.

⁶⁴ See *Brue v McMillian*, 175 Ala. 416, 57 So. 486; *Tuttle v Polk*, 84 Iowa 12, 50 N.W. 38; *Bonney v Reed*, 31 N.J.L. 133; *Brand v Multnomah County*, 38 Ore. 79, 60 Pac. 390, 62 Pac. 209; *Lyford v Willamar Independent School Dist.* (Tex. Comm. Ap.) 34 S.W. (2) 854; *State v Abraham*, 64 Wash. 621, 117 Pac. 501.

⁶⁵ *Pelt v Payne*, 60 Ark. 637, 90 Ark. 600, 30 S.W. 426; *Iowa Sav. etc. Assoc. v Heidt*, 107 Iowa 297, 77 N.W. 1050; *State v Norwood*, 12 Md. 195; *Brand v Multnomah County*, 38 Ore. 79, 60 Pac. 390, 62 Pac. 209; *Brown v Independent School Dist.* (Tex. Com. Ap.) 34 S.W. (2) 837; *State v Abraham*, 64 Wash. 621, 117 Pac. 501.

⁶⁶ *People v Moore*, 1 Idaho 662; *Keystone Gas Co. v Salisbury*, 192 Ky. 643, 234 S.W. 290; *Cowen v State*, 101 Ohio St. 387, 129 N.E. 719.

⁶⁷ *Aetna Insurance Co. v O'Malley* (Mo.) 118 S.W. (2) 3; *Kearney County v Taylor*, 54 Neb. 542, 74 N.W. 965; *Martin v South Salem Land Co.*, 94 Va. 28, 26 S.E. 591. Also see Note 25 A.L.R. 1137. But apparently contra: *Steele County v Erskine*, 98 Fed. 215, 39 C.C.A. 173; *Hodges v Snyder*, 186 N.W. 867, 45 S.D. 149, 25 A.L.R. 1128, aff'd 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819.

⁶⁸ *People ex rel. Harding v Wiley*, 289 Ill. 173, 124 N.E. 385. Also see Note 25 A.L.R. 1145. When is a judgment final? See *infra*, § 294.

§ 285. **Statutes Pertaining to Procedure and Legal Remedies, Generally.**—As a general rule,⁶⁹ legislation which relates solely to procedure or to legal remedies will not be subject to the rule that statutes should not be given retroactive operation.⁷⁰ Similarly, the presumption against retrospective construction is inapplicable.⁷¹ In other words, such statutes constitute an exception to the rule pertaining to statutes generally.⁷² Therefore, in the absence of a contrary legislative intention, statutes pertaining solely to procedure or legal remedy may affect a right of action no matter whether it

⁶⁹ *Brauer v Laughlin*, 211 Ill. Ap. 534; *In re Monaco*, 287 Ill. Ap. 540, 5 N.E. (2) 755; *Hollenbach v Born*, 143 N.E. 782, 238 N.Y. 34; *Lane v Brotherhood of Locomotive Eng. etc. (Ore.)* 73 Pac. (2) 1396. But see *U.S. Fidelity & Guar. Co. v U.S.*, 209 U.S. 306, 12 L.Ed. 804, 28 S.Ct. 537, and *State v Brown*, 146 Kan. 525, 73 Pac. (2) 19.

⁷⁰ For such rule, see § 277, *supra*. But it is possible that a legal right and a legal remedy may be so interlocked, that the destruction of the latter destroys the former. *Butler v Palmer (N.Y.)* 1 Hill 324. Also see *Winfree v Northern Pac. R. Co.*, 227 U.S. 296, 33 S.Ct. 273, 57 L.Ed. 518 (wrongful death act); *Relyea v Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N.W. 412 (statute of limitations).

⁷¹ *Nash v Robinson*, 226 Mich. 146, 197 N.W. 522; *Easterling Lumber Co. v Pierce*, 106 Miss. 672, 64 So. 461; *Shepard v People*, 25 N.Y. 406, *Judkins v Taffe*, 21 Ore. 89, 27 Pac. 221; *Falls v Key (Tex. Civ. Ap.)* 278 S.W. 893.

⁷² *Brauer v Laughlin*, 211 Ill. Ap. 534; *Hollenbach v Born*, 143 N.E. 782, 238 N.Y. 34. But note *Jacobus v Colgate*, 217 N.Y. 235, 111 N.E. 837, that there is no exception where there was no remedy before the statute's enactment. Statutes relating to procedure are exempt from the general rule, which looks with disfavor upon retrospective operation because no person has a vested right in any form of procedure. *Judkins v Taffe*, 21 Ore. 89, 27 Pac. 221. But so far as criminal procedure is concerned, it is suggested that it would probably be more consonant with the philosophy of our system of jurisprudence, to safeguard the rights of accused persons by applying the general rule which looks with stern disfavor upon retroactive effect. In *People v Cohen*, 245 N.Y. 419, 157 N.E. 515, where the criminal code of procedure provided that no statute therein would be retroactive unless expressly so declared, an excellent legislative example is available. Also see *Kring v Missouri*, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506, and *Moore v State*, 43 N.J.L. 203. But note *Jacquins v Common. (Mass.)* 9 Cush. 279.

came into existence prior to, or after the enactment of the statute.⁷³ Similarly, they may be held applicable to proceedings pending or subsequently commenced.⁷⁴ In any event, they will, at least, presumptively apply to accrued and pending as well as to future actions.⁷⁵

Yet a statute which relates to procedure or to legal remedy, if it interferes with vested rights or impairs the obligations of contracts, will be subject to the general rule, already discussed,⁷⁶ against retroactive operation.⁷⁷ Such a statute, even though it re-

⁷³ *City of Los Angeles v Oliver*, 102 Calif. Ap. 299, 233 Pac. 298; *City of Chicago v Industrial Comm.*, 292 Ill. 409, 127 N.E. 46; *In re Potter*, 106 Misc. 113, 175 N.Y.S. 598; *Spicer v Benefit Assoc.*, 142 Ore. 574, 17 Pac. (2) 1107, 21 Pac. (2) 187; *Lewis v Pennsylvania R. Co.*, 220 Pa. St. 317, 69 Atl. 821; *Boucofski v Jacobsen*, 36 Utah 165, 104 Pac. 117. Also see *State v Brossette*, 113 So. 366, 163 La. 1035; *McManus v Park*, 287 Mo. 109, 229 S.W. 211; *Phil H. Pierce Co. v Watkins*, 114 Tex. 153, 263 S.W. 905. An excellent illustration of the above text will be found in *Berry v Clark*, 77 Me. 482, 1 Atl. 360, where the following statute was enacted nearly four years after the date of the note sued upon: "No person who receives any money, or valuable thing, as the consideration for a contract, express or implied, made and entered into on Sunday, shall be permitted to defend any action upon such contract on the ground that it was made and entered into on Sunday, until he shall restore such consideration so received; provided that nothing herein contained shall apply to any action now pending." The court held that "there is no vested right in any particular remedy. Previous to the statute in question, a defendant sued upon a contract made on Sunday could avail himself of the defense that it was a Sunday contract; but the fact that such a statutory defense existed gave him no vested right, and therefore in this case no vested right has been impaired by the statute. It in no way operates upon the contract, or renders it valid. It exists precisely as it did before. The statute applies only to future remedies, and merely requires the defendant to restore the consideration received by him in the participation of an unlawful act as a condition upon which he may make his defense."

⁷⁴ *Fed. Reserve Bank v Kalin*, 77 Fed. (2) 50; *Demarse v Bruckman*, 298 N.Y.S. 736, 164 Misc. 331. Also see *Bowing v Delaware Rayon Co. (Dela.)* 188 Atl. 769; *Washington Nat. Ins. Co. v McLemore (La.)* 163 So. 773. In so far as the new statute merely provides for changes in the mode of procedure, it will not invalidate steps taken before it goes into effect, but will apply to all proceedings taken thereafter. *Clugston v Rogers*, 203 Mich. 339, 169 N.W. 9.

⁷⁵ *Ireland v Shipley (Md.)* 166 Atl. 593.

⁷⁶ See §§ 277-278, *supra*.

⁷⁷ *In re Ireland Dredging Corp.*, 61 Fed. (2) 765 (sequestration of assets); *Hoyt Metal Co. v Atwood*, 289 Fed. 453; *Adams v Creen*, 100 Ala. 218, 14 So. 54; *Chiles v School Dist.*, 103 Mo. Ap. 240, 77 S.W. 82 (judgment); *People v Warden*, 178 N.Y.S. 595, 109 Misc. 243; *Merchants Bank v Ballou*, 98 Va.

lates to procedure and presumptively is entitled to retroactive effect, should not be permitted to cut off existing rights without, at least, allowing the litigants a reasonable time within which to protect themselves against the restrictions imposed by the superseding statute.⁷⁸ In fact, such a period of time should be carefully provided for in any statute relating to remedy or procedure in order to guarantee its just operation so far as retroactivity is concerned.

112, 32 S.E. 481, 44 L.R.A. 306 (judgment); *Ferguson v Ferguson* (Va.) 192 S.E. 774; *Stewart v Vandervort*, 34 W.Va. 524, 12 S.E. 736, 12 L.R.A. 50. And see *McGirr v Pritchard*, 258 Ill. Ap. 467: "A cause of action once barred by the statute of limitations cannot be revived or the right of defense to an action when once acquired cannot be affected by a subsequent amendment or repeal of a statute, and the right to set up the bar of such a statute, or to interpose any other defense heretofore acquired to such a suit is a vested property right and cannot be taken away by legislation. The right of defense to an action is as much property within the meaning of the constitution as the right to maintain such an action itself, and to deprive a person of either by retroactive legislation would be to deprive that person of his property without due process of law. In view of this, together with the total absence of any express provision, or even any implication that it was the intention of the legislature to make the statute retroactive, the amendment in question does not in any way have any effect or bearing upon the right of the parties in the case now before the court." Also note *Common. v Central National Bank*, 293 Pa. 404, 143 Atl. 105, that there is no vested right in a mode of procedure, is a principle which also applies to actions pending.

⁷⁸ *Gilbert v Ackerman*, 159 N.Y. 118, 53 N.E. 753, 45 L.R.A. 118; *Hope Oil Corp. v Humble Oil & Ref. Co.* (Tex.) 43 S.W. (2) 272. "It is well settled that it is within legislative power to change a statute of limitations regarding the remedy for the enforcement of existing rights, if a reasonable time be allowed to resort to existing remedies, or a reasonable remedy be provided, to enforce such rights. A statute which undertakes to extinguish rights of action without giving such opportunity, is not deemed a statute of limitations, but an arbitrary, unlawful impairment of a constitutional right. It is further well settled that what is a reasonable time is a matter largely of legislative discretion." *Relyea v Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N.W. 412. For such a statutory provision, see § 423, *infra*. And note *Fannin County v Renshaw* (Tex.) 29 S.W. (2) 476, 478: "Statutes of limitation relating merely to the remedy do not give vested rights. The limitation provided for in the act in controversy simply defeats the remedy. There is an essential distinction between a statute which not only bars the remedy but also extinguishes the right to the thing or property in question. In the one case the right is extinguished, while in the other the right still exists but the remedy is taken away." And basically, it may be suggested that from a practical standpoint if the action is barred, is there any real difference whether the right is extinguished or not?

This rule is particularly applicable to statutes of limitations, but in order to insure the fair operation of any legislation, it would seem always pertinent to legislation, regardless of its nature, if such legislation be capable of harsh retrospective operation.

§ 286. The Principle Exempting Procedural Statutes From the Rule Against Retroactive Operation Analyzed and Criticized.—The court in *Byler v Hershman* (156 Misc. 349, 281 N.Y.S. 942) divulges the reason for exempting purely procedural statutes from the principle which looks askance upon a construction which gives statutes retroactive operation.

“Where a statute pertains and relates to procedural or adjective law, such as the burden of proof, rules of evidence, etc., the statute is held to be operative if the trial is held at a time subsequent to the enactment of the statute, even though the events and premises upon which the action is based antedated such enactment.

The reason for that exception to the general proposition outlined above is readily perceptible. So long as the contents of the statute relate only to the remedy, to the proceeding, to the form, then its postulates become operative only when and if such remedy, form or procedure is invoked, that is, at the trial. And if the trial post dates the enactment of the statute, even though the events upon which the action is based antedates such an operation, the operation of the statute is in effect *in futuro* just as all other statutes. Thus, in truth, this exemption is no exception at all. It is an application of the general rule to a varied state of facts.”

Nevertheless, while this view seems to stand upon a logical basis, it must be admitted that in many instances even a retroactive procedural statute operates unjustly. In such cases, even though vested rights are not destroyed, their enjoyment or protection is certainly impaired. Undoubtedly, a better view is the one which will subject procedural statutes to the rule applicable to statutes generally. This judicial attitude was taken by the court in *Murphy v Boston & Maine R. R. Co.* (77 N.H. 573, 94 Atl. 967), involving a statute which placed the burden of proving contributory negligence upon the defendant:

“‘In cases where the legislature have unquestionable power under the constitution to take away or substantially modify

the remedy in a pending suit, it is generally impolitic and unjust to exercise the power. When the plaintiff commences his action, he relies and has reason to rely on the remedy which the existing law gives him in the form of action which he has chosen; and it is an established maxim in the construction of statutes that the lawgiver will not be presumed to intend that a law should in any way affect the remedy in a pending suit, unless the intention is very clearly expressed.' The same reasoning is equally applicable to a defendant with reference to the rules of procedure by which he seeks to establish his defense."

Probably the best judicial attitude is the one enjoined upon the courts by legislative enactment and discussed in *Luitivilei v Luitivilei* (192 N. Y. S. 891, 118 Misc. 192):

"There is a safety valve, however, provided in section 1569, which permits the court or a judge to apply any 'remedial provision,' whatever that means, 'in the interest of justice.'"

Obviously, certain new procedural statutes are of such a character that their application retroactively will tend to promote justice, without any consequential embarrassment or detriment to any of the parties concerned. Of course, retroactive effect in such instances cannot be objectionable. But, on the other hand, even statutes relating to procedure may be productive of undesirable results, if applied retroactively. Where this is true, they should be subject to the general rule which looks with disfavor upon retroactivity. In view of this situation, if the court can select the rule to be applied, as determined from a consideration of the effect of retroactivity, it would seem that the undesirable effects of retroactive legislation would thereby be largely eliminated.

In lieu of this rule, those cases, which follow the principle announced in *Relyea v Tomahawk Paper & Pulp Co.* (102 Wis. 301, 78 N. W. 412) that a reasonable time should be allowed for those subject to the new law within which to protect themselves against the new restrictions, provide a shield against the injustices which too often flow from giving any statute retroactive operation. Or the same result may be secured through the incorporation of a saving clause, or some similar device whereby the old law is continued in effect so far as matters arising during the life of the old law are concerned.

§ 287. **Remedies.**—The principles above discussed will likewise apply whether the statute creates a new remedy or enlarges an existing one;⁷⁹ being limited only by the requirement that contractual obligations cannot be affected or vested rights disturbed.⁸⁰ So long as an alteration or extension of a remedy does not amount to a substantial impairment of an existing right, it may be deemed retroactive.⁸¹ This is so because a statute which affects the remedy only is remedial in its nature, and consequently is entitled to be construed as remedial legislation. Conversely, therefore, if the statute pertains to the remedy, if vested rights are impaired or destroyed, it should be regarded as within the rule against retroactive construction. To this extent, the law seems harmonious.

But, as in the case of procedural statutes, oftentimes the right and the remedy are so closely connected that any alteration in the remedy may adversely affect the right. Such was true in *Winfree v Northern Pacific R. Co.* (227 U. S. 296, 33 S. Ct. 273, 57 L. Ed. 518):

“It is true that it is said there was liability on the part of the defendant for its negligence before the passage of the act

⁷⁹ *Barnett v Vanmeter*, 7 Ind. Ap. 45, 33 N.E. 666; *Myers v Moran*, 99 N.Y.S. 269, 113 Ap. Div. 427. A suit pending to enforce a remedy or right conferred solely by statute is abated by an unconditional repeal before the rendition of judgment. *Globe Pub. v State Bank*, 41 Neb. 175, 59 N.W. 683, 27 L.R.A. 854.

⁸⁰ *Selectmen of Amesbury v Citizens Elect. St. R. Co.*, 199 Mass. 394, 85 N.E. 419; *State v Howse*, 134 Tenn. 67, 183 S.W. 510.

⁸¹ *In re Rosenberg's Estate*, 284 N.Y.S. 260, 157 Misc. 490. “In cases where the legislature has unquestionable power under the constitution to take away or substantially modify the remedy in a pending suit, it is generally impolitic and unjust to exercise the power. When the plaintiff commences his action, he relies and has reason to rely on the remedy which the existing law gives him in the form of action which he has chosen; and it is an established maxim in the construction of statutes that the lawgiver will not be presumed to intend that a law should in any way effect the remedy in a pending suit, unless the intention is very clearly expressed.” *Murphy v Bost. & Maine R. R.*, 77 N.H. 573, 94 Atl. 967. The repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of the repeal, especially where the repealed statute creates a cause of action and provides a remedy not known to the common law. *Pacific Gas & Elec. Co. v State*, 214 Calif. 369, 6 Pac. (2) 78. But see *Coast Surety Co. v Municipal Court*, 136 Calif. Ap. 186, 28 Pac. (2) 421, that the rule that statutory remedies are pursued with full realization that the legislature may abolish the right to recover, is inapplicable to existing rights of action which have accrued. And from the standpoint of fairness, this latter view is clearly to be preferred.

of Congress and the act has only given a more efficient and a more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character."

Where this is the case, of course, the rule against retroactive operation should naturally be applied. And usually such cases arise where the statute involved creates both the right and the remedy.

§ 288. Jurisdiction, Venue and Parties.—A court may be given jurisdiction over a cause of action which arose before the jurisdictional statute was passed.⁸² On the other hand, it is also possible that a statute may be construed so as to take jurisdiction from a court over a case already pending,⁸³ although such an intent should be clearly expressed in the statute.⁸⁴ So also a statute transferring jurisdiction over certain causes of action, may operate on existing causes of action.⁸⁵

Statutes pertaining to venue, like those pertaining to jurisdiction, may, too, where such is the clear legislative intent,⁸⁶ be construed as applicable to actions already existing or pending when they are enacted.⁸⁷ In like manner, a statute which enumerates the proper parties in an action is subject to a retroactive construction so as to apply to an action pending at the time the statute is enacted,⁸⁸ or even to a cause of action already in existence though not pending in court.⁸⁹

⁸² *Larkin v Saffarans*, 15 Fed. 147; *Grand Trunk Ry. v Board of Comrs.*, 88 Me. 225, 33 Atl. 988; *State v Welch*, 65 Vt. 50, 25 Atl. 900; *Ball v Presidio County* (Tex. Civ. Ap.) 27 S.W. 702.

⁸³ *Fairchild v U.S.*, 91 Fed. 297; *Remington v Smith*, 1 Colo. 53; *State v Lackey*, 2 Ind. 285 (criminal jurisdiction).

⁸⁴ *Crane v Reeder*, 28 Mich. 527; *State v Welch*, 65 Vt. 50, 25 Atl. 900. Also see *Larkin v Saffarans*, 15 Fed. 147. But apparently contra: *Buck v Dowley*, 16 Gray (Mass.) 555.

⁸⁵ *Grand Trunk Ry. v Board of Comrs.*, 88 Me. 225, 33 Atl. 988.

⁸⁶ *In re Sanborn*, 96 Mich. 606, 56 N.W. 25; *Baines v Jamison*, 86 Tex. 118, 23 S.W. 639.

⁸⁷ *Houston v Graves*, 50 Tex. 181.

⁸⁸ *Holyoke v Haskins*, 9 Pick. (Mass.) 259. Also see *Waddill v Masten*, 172 N.C. 582, 90 S.E. 694, regarding substitution of parties or joining of new parties.

⁸⁹ *Berry v Kansas City etc. R. Co.*, 52 Kan. 759, 34 Pac. 805.

§ 289. **Pleading.**—Statutes relating to rules of pleading can also be construed as applicable to causes of action already accrued⁹⁰ or to pending actions,⁹¹ although here, too, retroactive operation should be clearly intended by the legislature, especially where the action is pending in court when the statute is enacted. Where the action is pending at the time the statute modifying or amending existing rules of pleading becomes effective, the statute should, unless it clearly appears to be intended otherwise, be held inapplicable.^{91a}

§ 290. **Evidence.**—But statutes relating to rules of evidence are not subject to the general principle which looks with disfavor on giving statutes retrospective effect,⁹² unless, of course, vested rights are disturbed or contractual obligations impaired,⁹³ or new rights created.⁹⁴ As a result, a statute declaring a rule of evidence may be applied to action already accrued⁹⁵ as well as to those which

⁹⁰ *Southern Indiana R. Co. v Peyton*, 157 Ind. 690, 61 N.E. 722; *Howard v Fall*, 203 Mass. 273, 89 N.E. 615; *Gibson v Miller*, 28 Ohio Cir.Ct. R. 421. Also see *Duggan v Ogden*, 278 Mass. 432, 180 N.E. 153, 52 A.L.R. 765.

⁹¹ *Willis v Fincher*, 68 Ga. 444; *Howard v Fall*, 203 Mass. 273, 89 N.E. 615; *State ex rel. Cardwell v Stuart*, 111 Mo. Ap. 478, 86 S.W. 471; *Agua Pura Co. v Las Vegas*, 10 N.M. 6, 60 Pac. 208, 50 L.R.A. 224; *Delaney v City of Chester*, 26 Pa. Dist. 62; *Blair v Cary*, 9 Wis. 543.

^{91a} *New York L. Ins. Co. v Cumins*, 24 Fed. (2) 1. Also see *Crump v Wallace*, 27 Ala. 277; *Potter v Titcomb*, 11 Me. 157.

⁹² *Matter of Patterson*, 155 Calif. 626, 102 Pac. 941; *Ritter v Seestedt*, 212 Mich. 208, 180 N.W. 412; *Blyer v Hershman*, 281 N.Y.S. 942, 156 Misc. 349. Also see *Downs v Blount*, 170 Fed. 15, 95 C.C.A. 289; *Wheelock v Myers*, 64 Kan. 47, 67 Pac. 632; *In re McNaughton's Will*, 138 Wis. 179, 118 N.W. 997. But see *Lowe v Harris*, 112 N.C. 472, 17 S.E. 539, 22 L.R.A. 379, where an alteration of the parol evidence rule was held to be prospective only.

⁹³ *Lowe v Harris*, 112 N.C. 472, 17 S.E. 539, 22 L.R.A. 379 (parol evidence to identify land); *Hartley v Johnson*, 54 R.I. 477, 175 Atl. 653 (prima facie case made by proof that motor vehicle was registered in the name of the defendant).

⁹⁴ *Hartley v Johnson (R.I.)* 175 Atl. 653.

⁹⁵ *Southern Indiana R. Co. v Peyton*, 157 Ind. 690, 61 N.E. 722; *Stocker v Foster*, 178 Mass. 591, 60 N.E. 407; *Lewis v San Antonio*, 7 Tex. 288; *Blyer v Hershman*, 156 Misc. 349, 281 N.Y. S. 942.

are already pending in court,⁹⁶ unless the legislative intent negatives such operation.⁹⁷ In criminal cases, however, even rules of evidence should not be given a retrospective effect.⁹⁸ At least, this is by far the better view, as will appear more fully later on.⁹⁹

Of course, the reason for exempting statutes prescribing rules of evidence from the general rule disfavoring retrospective operation, will be found in the nature of such statutes. They are remedial, or procedural. As was said by the court in *Baxter v Hamilton* (20 Mont. 327, 51 Pac. 265):

“It is fundamental that a person has no vested right to have a controversy determined by existing rules of evidence. Like other rules affecting the remedy, they are subject to modification and control by the legislature.”

Nevertheless, the alteration of existing rules of evidence, particularly so far as pending litigation is concerned, may operate very harshly. In most instances, suits are instituted in view of existing rules of evidence, and an alteration of such rules may actually operate to destroy the cause of action by making the proof of legal liability impossible. While the rule which holds that rules of evidence may be given a retroactive construction, such a construction, because of its inherent capacity for harsh operation, is highly objectionable, at least, where the action is pending at the time the rule is altered or abrogated.

§ 291. Witnesses.—Whether a witness is competent or not will depend upon the law in existence at the time he is called upon to testify—that is, at the time of the trial; hence a statute pertaining to the competency of a witness will have retroactive

⁹⁶ *Hubbard v New York etc. R. Co.*, 70 Conn. 563, 40 Atl. 533; *Stocker v Foster*, 179 Mass. 591, 60 N.E. 407 (admissibility of evidence); *Woodvine v Dean*, 194 Mass. 40, 79 N.E. 882; *Fish v Chicago etc. R. Co.*, 82 Minn. 9, 84 N.W. 458 (prima facie evidence); *Baxter v Hamilton*, 20 Mont. 327, 51 Pac. 265; *Grand Forks First M. E. Church v Fadden*, 8 N.D. 162, 77 N.W. 615; *Cincinnati etc. Co. v Hedges*, 15 Ohio Cir. Ct. R. 254 (burden of proof), *Walker v Alexander* (Tex. Civ. Ap.) 212 S.W. 713. And see *Howard v Moot*, 64 N.Y. 262. If the statute states that it is confined to cases pending, it should not be applied to cases later filed. *Hardee v Lanford*, 6 Fla. 13.

⁹⁷ See *Johnson v Fry*, 195 N.C. 832, 143 S.E. 857.

⁹⁸ *Kittrell v State*, 89 Miss. 666, 42 So. 609. Also see § 296, note 139, *infra*.

⁹⁹ See § 295, *infra*.

operation and affect pending litigation as well as accrued actions not yet sued upon, if such is the legislative intent.¹⁰⁰

§ 292. **Trial.**—Statutes regulating matters pertaining to the practice and procedure of the court in the trial of a case may also be given a retroactive operation, as a general rule.¹⁰¹ Thus, statutes designating the time¹⁰² and regulating the mode¹⁰³ of trial, fixing the competency of jurors,¹⁰⁴ placing the burden of proof,¹⁰⁵ and requiring security for costs,¹⁰⁶ may be construed

¹⁰⁰ *The Farmer v McGraw*, 31 Ala. 659; *Duckworth v Duckworth*, 98 Md. 92, 56 Atl. 490; *Besson v Cox*, 35 N.J. Eq. 87; *Tabor v Ward*, 83 N.C. 201; *Johnson v Dexter*, 37 Vt. 641. But see *Hammond v Myrick*, 14 Ga. 77.

¹⁰¹ *Orman v Crystal River Ry. Co.*, 5 Colo. Ap. 493, 39 Pac. 434; *Gibson v Miller*, 28 Ohio Cir.Ct. R. 28; *Phoenix Ins. Co. v Shearman* (Tex. Civ. Ap.) 43 S.W. 1063; *Jones v Commonwealth*, 86 Va. 661, 10 S.E. 1005. Such statutes can, of course, by their own language be made applicable only to future actions. *Trebon v Zuraff*, 50 Iowa 455; *Gassert v Bogk*, 7 Mont. 585, 19 Pac. 281, affd. 149 U.S. 17, 13 S.Ct. 738, 37 L.Ed. 631.

¹⁰² *Hoa v Lefranc*, 18 La. Ann. 393. And see *Hathaway v Merchants' Loan Co.*, 218 Ill. 580, 75 N.E. 1060, where a statute of limitations was given retroactive effect, but the presumption is against such effect, at least, so far as causes of action arising subsequent to the statute's enactment is concerned. *Sohn v Waterson*, 17 Wall. 596 (U.S.) 21 L.Ed. 737; *McKisson v Davenport*, 83 Mich. 211, 47 N.W. 100, 10 L.R.A. 507; *Thomas v Higgs*, 68 W.Va. 152, 69 S.E. 654. A reasonable time should be given for the filing of existing cases after the statute's enactment. *Hathaway v Merchants' Loan Co.*, 218 Ill. 580, 75 N.E. 1060.

¹⁰³ *Hoa v Lefranc*, 18 La. Ann. 393; *State v Main*, 16 Wis. 398.

¹⁰⁴ *Mercer v State*, 17 Ga. 146. This rule is equally applicable to statutes regulating challenges of jurors. *Lore v State*, 4 Ala. 173; *Stokes v People*, 53 N.Y. 164.

¹⁰⁵ *Blyer v Hershman*, 281 N.Y. S. 942, 156 Misc. 349. And note *Murphy v Boston & Maine R. R. Co.*, 77 N.H. 573, 94 Atl. 967, where after plaintiff had instituted his suit and before the trial thereof, the legislature passed an act which provided that: "Hereafter, in all actions of tort for personal injury, contributory negligence on the part of the plaintiff shall be a good defense to the action, and the burden of proving the same shall be upon the defendant." In deciding that the statute did not apply the court announced: "Moreover, the language of the statute does not require the construction contended for by the plaintiff. The first word in the section, 'Hereafter', while probably unnecessary, may indicate a purpose to restrict its operation to actions thereafter brought, in contradistinction to actions then pending. But if it could also be reasonably claimed that the language refers to future trials of actions for personal injuries, the result would be that the statute is ambiguous in this respect and consequently that it does not clearly appear that it was intended to govern the trial of pending actions.

as applicable to all existing causes of action whether pending or not. This is the rule, except with reference to the burden of proof, in both civil and criminal cases,¹⁰⁷ although in the latter type of cases, it would appear more consonant with our conception of criminal justice to require the legislative intent for retroactive effect to be clearly expressed.¹⁰⁸ And, of course, a statute regulating practice and procedure should not apply to a trial already had before the statute's enactment or effective date.¹⁰⁹

§ 293. **Judgments.**¹¹⁰—A statute which regulates the enforcement of a judgment may receive a retroactive construction.¹¹¹ And it is immaterial whether the judgment was secured after or before the statute's enactment or effectiveness, for in either event the statute may be applicable. It has been so held where the statute pertained to the levy¹¹² and the return¹¹³ of execution, and to the sale of property by virtue of the execution.¹¹⁴ But considerable care should be exercised in order that a judgment secured before the enactment of the regulatory statute may not be impaired, de-

Either view is fatal to the plaintiff's contention." Also note *Walker v Walker* (Tex.) 212 S.W. 713, rev. 227 S.W. 696: "We think the general rule is that as to civil cases a statutory amendment affecting the admissibility of evidence, or the probative effect of certain acts, pleadings, writings, affidavits, etc., affects suits pending at the time of the amendment as well as suits filed thereafter." But note *Dunlap v U.S.*, 43 Fed. (2) 999, ap. dis. 45 Fed. (2) 1021.

¹⁰⁶ *Kimbray v Draper* (Eng.) L.R. 3 Q.B. 160.

¹⁰⁷ See cases under note 101, *supra*. But apparently, and preferably, regarding this view inapplicable to criminal cases, see *Secor v State*, 118 Wis. 621, 95 N.W. 942.

¹⁰⁸ *Secor v State*, 118 Wis. 621, 95 N.W. 942.

¹⁰⁹ *People v Chalmers*, 5 Utah 201, 14 Pac. 131; *Secor v State*, 118 Wis. 621, 95 N.W. 942. But the statute can be so worded that such trials will be affected. *Wormley v Hamburg*, 46 Iowa 144.

¹¹⁰ For Curative Statutes and their effect on judgments, see § 283, *supra*. And the costs in a case are controlled by the law in force at the termination of the action. *Cain v French*, 29 Calif. Ap. 725, 156 Pac. 518; *Lew v Bray*, 81 Conn. 213, 70 Atl. 628; *Dougherty v Downey*, 1 Mo. 674; *Bray v Williams*, 137 N.C. 387, 49 S.E. 887; *Adair v Decker*, 17 Pa. Dist. 614. But see *Whitney v Teichfuss*, 11 Colo. 555, 19 Pac. 507.

¹¹¹ *Henschall v Schmidt*, 50 Mo. 454. Also see *Du Boise v Bloom*, 38 Iowa 512, pertaining to stay of execution.

¹¹² *Pratt v Jones*, 25 Vt. 303.

¹¹³ *Allen v Cunningham*, 3 Leigh (Va.) 395.

¹¹⁴ *Spencer v Carter* (Va.) 4 Hen. & M. 402.

stroyed or extended. In fact, no statute should receive a construction which will impair an existing judgment or enlarge or validate it in any way.¹¹⁵ As a result, in case of doubt, statutes affecting judgments should be regarded as applying to subsequently secured judgments only.¹¹⁶

There does seem to be, however, at least one important exception. A judgment in a suit brought for the enforcement of a public right may be annulled by subsequent legislation and thereafter rendered unenforceable, although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away.¹¹⁷

§ 294. Appeals and Writs of Error.—If it is in accord with the legislative intention, statutes affecting appeals and writs of error will be given retroactive effect so as to be applicable to appeals and writs of error pending when the statutes were enacted.¹¹⁸ Such a construction, however, is not, and should not be looked upon

¹¹⁵ *Lake v Bonyng*, 161 *Calif.* 120, 118 *Pac.* 535; *State v New York*, etc. *R. Co.*, 71 *Conn.* 709, 40 *Atl.* 925; *Duperier v Iberia Parish Jury*, 31 *La. Ann.* 709; *McNichol v U.S. Mercantile Reporting Co.*, 74 *Mo.* 457; *Moore County Board v Blue*, 190 *N.C.* 638, 130 *S.E.* 743; *Fielden v Lahens*, 22 *N.Y.S.* 436. And note *Swinburne v Mills*, 17 *Wash.* 611, 50 *Pac.* 489, where a statute which authorized the court to open defaults, was held inapplicable to defaults already existing.

¹¹⁶ *Tremont etc. Mills v Lowell*, 165 *Mass.* 265, 42 *N.E.* 1134; *Caruth v Anderson*, 24 *Miss.* 60; *State v Connell*, 43 *N.J.L.* 106; *Denny v Bean*, 51 *Ore.* 180, 93 *Pac.* 693, 94 *Pac.* 503.

¹¹⁷ *Hodges v Snyder*, 261 *U.S.* 600, 43 *S.Ct.* 435, 67 *L.Ed.* 819.

¹¹⁸ *Gwin v U.S.*, 184 *U.S.* 669, 22 *S.Ct.* 526, 46 *L.Ed.* 741; *Callahan v Jennings*, 16 *Colo.* 471, 27 *Pac.* 1055; *Lake Erie etc. R. Co. v Watkins*, 157 *Ind.* 600, 62 *N.E.* 443; *Donaldson v Security Trust Co. (Ky.)* 47 *S.W.* 763, 56 *S.W.* 424; *McDowell v Fuller*, 169 *Mich.* 332, 135 *N.W.* 265; *Ryan v Waule*, 63 *N.Y.* 57; *Moberly v Roth*, 23 *Okla.* 856, 102 *Pac.* 182; *Catterlin v Busn*, 39 *Ore.* 496, 59 *Pac.* 706, 65 *Pac.* 1064; *McClain v Williams*, 10 *S.D.* 332, 73 *N.W.* 72, 43 *L.R.A.* 287; *Davidson v Brown*, 93 *Wis.* 85, 67 *N.W.* 42. Of course, pending appeals may be expressly exempted. *Harrison v Smith* 2 *Colo.* 625. A writ of error, even in a criminal case, relates to remedies, and is not retroactive in any obnoxious sense because it relates to writs of error on past judgments. *Jacquin v Common. (Mass.)* 9 *Cush.* 279.

with favor.¹¹⁹ Therefore, unless clearly applying to pending appeals and writs of error, statutes of this type should be considered as relating only to future appeals and writs of error,¹²⁰ and any doubt should be resolved against retroactive operation.

Moreover, statutes pertaining to appeals and writs of error may also affect pending cases in which judgment has not been

¹¹⁹ *Catterlin v Bush*, 39 Ore. 496, 59 Pac. 706, 65 Pac. 1064. And retroactive effect must be given by express language and not simply by implication. *Callahan v Jennings*, 16 Colo. 471, 27 Pac. 1055. Also see *Lusk v Kershow*, 17 Colo. 481, 30 Pac. 62. But note *United States v The Peggy (U.S.)* 1 Cranch 103, 2 L.Ed. 49: "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. It is true, that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." "It is within the jurisdiction of the lawmaking power to cut off the right of appeal by retroactive legislation so as to destroy appeals perfected before the taking effect of such law. . . . To do this obviously works great hardship and apparent injustice upon those who may have waived other remedies allowed by law for the correction of possible errors. . . . Therefore, unless the act itself clearly indicates an intention that it shall have a retroactive or retrospective effect, the rule of statutory construction that such statutes are not to be construed as intended to apply retroactively so as to affect pending appeals, is fully recognized and well established by the decisions of this state. . . . It is well settled that, in order that such changes in the law as the termination of appellate jurisdiction may affect pending appeals, the amending law must either expressly so declare or an implication that such was the intention of the lawmaking power must be definite and clear." *Jones v Summer*, 105 Calif. Ap. 51, 286 Pac. 1093, 1094.

¹²⁰ *Catterlin v Bush*, 39 Ore. 496, 59 Pac. 706, 65 Pac. 1064. Also see *Salisbury v La Fitte*, 50 Colo. 404, 115 Pac. 533; *Terry v Johnson*, 105 Ky. 760, 49 S.W. 767; *Missouri etc. R. Co. v Waggoner*, 102 Tex. 260, 115 S.W. 1172.

rendered,¹²¹ as well as those in which judgment has been rendered,¹²² if such is the legislative intention, and provided, however, in the latter instance, that vested rights are not interfered with or destroyed.¹²³ In fact, statutes regulating appeals and writs of error must not ever impair vested rights obtained by judgment.¹²⁴ And while the cases are not uniform or harmonious, those are certainly to be preferred which refuse to give a statute retroactive effect so as to affect a judgment correctly rendered but pending on appeal, by destroying or altering the cause of action or a defense thereto on which such judgment was rendered.¹²⁵ The validity of a judg-

¹²¹ *Bernard v Boggs*, 4 Colo. 73; *Holcomb v People*, 79 Ill. 409; *Evansville etc. R. Co. v Terre Haute*, 161 Ind. 26, 67 N.E. 686; *Western Tie etc. Co. v Nayler Drain. Dist. Co.*, 226 Mo. 420; 126 S.W. 499; *Niendorff v Manhattan R. Co.*, 150 N.Y. 276, 44 N.E. 976; *Travelers Ins. Co. v Myers*, 159 Ohio St. 332, 52 N.E. 831; *Wallace v Pecos etc. R. Co.*, 50 Tex. Civ. Ap. 296, 110 S.W. 162; *Allison v Wood*, 104 Va. 765, 52 S.E. 559. But a *contra* and preferable view seems to prevail in Canada. *Doran v Jewell*, 49 Can. S.C. 88; *Williams v Irvine*, 22 Can. S.C. 108. A case pending on appeal from the justice of the peace court in the circuit court is a case pending. *Carlton v Herndon*, 81 W.Va. 219, 94 S.E. 131.

¹²² *De Mund v Olcester (Ariz.)* 141 Pac. 573; *People v Nash*, 15 Calif. Ap. 320, 114 Pac. 784; *Lake Erie etc. R. Co. v Watkins*, 157 Ind. 600, 62 N.E. 443; *Leavenworth Coal Co. v Barber*, 47 Kan. 29, 27 Pac. 114; *Hale v Grogan*, 106 Ky. 311, 50 S.W. 257; *Oppegaard v Renville County*, 110 Minn. 300, 125 N.W. 504; *Ryan v Waule*, 63 N.Y. 57; *Rouse v Chappell*, 26 Ohio St. 306; *Boucofski v Jacobsen*, 36 Utah 165, 104 Pac. 117; *Allison v Wood*, 104 Va. 765, 52 S.E. 559.

¹²³ *Cassard v Tracy*, 52 La. Ann. 835, 27 So. 368, 49 L.R.A. 272; *Atkinson v Dunlap*, 50 Me. 111; *Germania Sav. Bank v Suspension Bridge*, 159 N.Y. 362, 54 N.E. 33; *Gompf v Wolfinger*, 67 Ohio St. 144, 65 N.E. 878; *Lancaster v Barr*, 25 Wis. 560. Also see *Carleton v Goodwin*, 41 Ala. 153, where a statute was held to be invalid that revived a discontinued appeal.

¹²⁴ Apparently, vested rights are not interfered with where a statute is enacted granting a new trial, before a pending suit was tried. *Lovell v Davis*, 52 Mo. A. 342. But the right of appeal has been held to be properly taken away through the enactment of a statute even as to a case in which judgment had been rendered before the passage of such statute. *Ryan v Waule*, 63 N.Y. 57. In connection with text, also see *Pacific Mail S.S. Co. v Joliffe*, 2 Wall. (U.S.) 450, 17 L.Ed. 805; *In re Standard*, 126 Calif. 112, 54 Pac. 259, 58 Pac. 462, 45 L.R.A. 788; *Parmelee v Lawrence*, 48 Ill. 331.

¹²⁵ *People v Moore*, 1 Idaho 662; *Bedier v Fuller*, 116 Mich. 126, 74 N.W. 506. But see *King v Course*, 25 Ind. 202; *In re Commissioner of Public Works*, 97 N.Y.S. 503, 111 Ap. Div. 285.

ment should be preferably tested by the law existing at the time of the judgment's rendition.¹²⁶

If the rule would always be applied that the validity of a judgment should be determined by the law in force at the time of the first rendition thereof, even though that judgment was not final, a more equitable operation of the law would result. Actually, when a judgment is rendered, even though it is subject to appeal, is it not logical to regard it as creating vested rights—absolutely vested so far as the law is concerned under which the judgment was rendered—subject only to the condition subsequent that the judgment may be reversed for errors committed in its rendition? That this view of the status of a judgment is a correct one, appears more vividly when we consider what happens when the judgment is not appealed from, or when it is not prosecuted to its ultimate determination. In such instances, the judgment really becomes final for all practical purposes from the date it was rendered. The appeal simply prevents its enforcement until the appellate court can determine whether it was rendered according to the law. That the judgment when rendered by the trial court possesses all the essential elements of a final judgment is further revealed when we recall that even an appeal will not in all cases prevent an enforcement of the judgment, unless a supersedeas bond is posted.

It would seem, however, at least as a general rule, that so far as statutes which pertain to appeals are concerned, there is little danger of impairing vested rights so long as the judgment is not final. Naturally, therefore, it is essential to know when a judgment is final. As we have just indicated, there is some confusion in this respect. Is the judgment a final one when rendered by

¹²⁶ *Wright v Graham*, 42 Ark. 140; *Hancock v Thom.*, 46 Calif. 643; *Redinbo v Fretz*, 99 Ind. 458; *Morrison v Pepperman*, 112 Iowa 471, 84 N.W. 522; *Owensboro, etc., R. Co. v Barclay*, 102 Ky. 16, 43 S.W. 177; *State v Kirkland*, 41 S.C. 20, 19 S.E. 215; *Metropolitan Life Ins. Co. v Rutherford (Va.)* 35 S.E. 719. And note *Union Pac. R. Co. v Snow*, 231 U.S. 204, 58 L.Ed. 184, 34 S.Ct. 104; *State v Small*, 131 Mo. A. 470, 109 S.W. 1079. But contra, that the case will be controlled by the law existing at the time of the appellate court's decision. *Yeaton v U.S.*, 5 Cranch (U.S.) 281, 3 L.Ed. 101; *Merlo v Johnston City, etc., Co.*, 258 Ill. 328, 101 N.E. 525; *Day v Day*, 22 Md. 530; *Montague v State*, 54 Md. 481; *Donnelly v Scarborough*, 91 Miss. 584, 46 So. 404; *Cline v Brooks*, 65 Mo. 61; *Simpson v Stoddard County*, 173 Mo. 421, 73 S.W. 700; *In re Stickney*, 185 N.Y. 107, 77 N.E. 993. Of course, contract rights cannot be interfered with. *American Sugar Ref. Co. v New Orleans*, 119 Fed. 691, 55 C.C.A. 328.

the court of first resort or the court of last resort? Does a judgment rendered in a *nisi prius* court create property rights of sufficient calibre that any impairment thereof, except in accordance with the law under which they were adjudicated, operates to impair vested rights? Most cases seem to take the view that as long as the case is pending; that is, as was suggested in *Stockard v Hamilton* (25 N. M. 240, 180 Pac. 294), so long as it remains undecided or not terminated, it is a pending case. Logically, this view is probably correct; and, as a result, and in accord with the announcement of the rule in *Wall v Chesapeake & Ohio Ry. Co.* (290 Ill. 227, 125 N. E. 20), the appellate court must dispose of the case under the law in force when its decision was rendered. The judgment, therefore, does not become final until announced by a court of last resort.

As a result of the rule which will allow the retroactive operation of statutes relating to appeals until a final judgment has been rendered, any alteration in such statutes obviously affects pending appeals. If the law as it exists upon the judgment's rendition and before the appeal is taken, is not regarded as applicable, some authorities point out what seems to be an intermediate view, and insist that the law in force at the time the appeal is taken or granted should control. The reason for this rule is pronounced by the court in the rather recent case of *Beal v Superior Court* (137 Calif. Ap. 559, 31 Pac. (2) 223, 225):

“There should be no vested right in a wrong judgment before the same has become final. . . . While the right of appeal may be limited by time and by other considerations, when taken, the appeal is a further proceeding every step of which arises after judgment. The losing party may decide to appeal at any time within the limit provided. How the appeal may then be taken and the manner of considering the same are entirely matters of procedure relating to acts occurring after the date of judgment. Any rules with respect thereto became applicable, not by reason of the judgment but by the taking of the appeal. It seems reasonable that this subsequent step, which may not have been contemplated when the judgment was entered, should be governed by the rules of law in effect when it is taken rather than by those which prevailed at a former time when an act occurred which has been completed and which in itself calls for no further rules of procedure.”

§ 295. **Amendatory Acts, Generally.**¹²⁷—As with statutes generally, an amendment will have no retrospective operation, unless its terms clearly indicate a different intent.¹²⁸ There is also a presumption that amendments are effective prospectively.¹²⁹ Consequently, rights acquired under a statute before its amendment are not affected, unless the amending statute, expressly or by necessary implication so provides.¹³⁰ But if the legislative intent requires it, retroactive operation must be given to the amendment.¹³¹

But there are exceptions to the general rule against retroactive operation even in the case of amendments. For instance, an amendatory act which is not passed until after the rights of the parties have become fixed cannot be applied,¹³² for amendatory acts can no more abrogate or impair vested rights than original statutes, but where the amendment relates to procedure and remedy, it may be given retroactive effect.¹³³ Even so, it is not always easy to determine when retrospective effect is proper, for the line of demarcation between rights and remedies and procedure is often very vague. Some of the difficulty, however, will vanish if the distinction pointed out in *McGirr v Pritchard*¹³⁴ is kept in mind:

¹²⁷ See also § 306, *infra*, for further treatment.

¹²⁸ *Erie County v Lowenstein*, 195 N.Y.S. 177, 202 App. Div. 579.

¹²⁹ *Los Angeles Bond & Securities Co. v Health (Calif.)* 7 Pac. (2) 1089; *American Surety Co. v Alamo Iron Works (Tex. Civ. Ap.)* 29 S.W. (2) 493, *rev. on other grounds*, 36 S.W. (2) 714.

¹³⁰ *Gully v Holaday (Miss.)* 145 So. 742; *People ex rel Beckford v Cheshire*, 217 N.Y.S. 215, 128 Misc. 10. Also see *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883.

¹³¹ *Warner v Walsh*, 27 Fed. (2) 952; *In re Frees' Estate*, 187 Calif. 150, 201 Pac. 112; *Cummins v Pence*, 174 Ind. 115, 91 N.E. 529 (implication); *Parsons v Wayne County Cir. Judge*, 37 Mich. 287; *Mott Store Co. v St. Louis, etc., R. Co.*, 254 Mo. 654, 163 S.W. 929; *Abbott v State*, 117 Neb. 350, 220 N.W. 578; *In re Kingsbury*, 230 N.Y. 580, 130 N.E. 901; *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883; *Kelley v State*, 94 Ohio St. 331, 114 N.E. 255; and see *Leak v Gay*, 107 N.C. 468, 12 S.E. 312 (implication). Where a statute is amended "so as to read as follows," it is not operative retrospectively. *People v Sears (Ill.)* 176 N.E. 273.

¹³² *New York, etc., R. Co. v Huebschmann*, 111 N.J. Eq. 547, 162 Atl. 767.

¹³³ *Rice v Dunlap*, 205 Calif. 133, 270 Pac. 196; *Macaffer v Boston & M. R. R.*, 274 N.Y.S. 246, 242 Ap. Div. 136; also see *In re Martell's Estate (Mass.)* 177 N.E. 102, that an amending statute which relates to procedure will also be applicable to cases already pending.

¹³⁴ *McGirr v Pritchard*, 258 Ill. Ap. 467.

"We are of the opinion that since the right of action for death by a wrongful act is wholly statutory and must be taken with all the conditions imposed upon it, the burden was on appellant to bring himself within the requirements of the statute and if the creating a right to institute a suit for damages requires the action to be brought within a specified time, it is more than an ordinary statute of limitation but goes to the existence of the right itself. It is a condition attached to the right to sue and must be complied with and if suit is not instituted within the time required by the statute giving the right to recover for a wrongful act, it cannot be, by the amendment to the Practice Act in question, extended, nor can the amendment relieve the appellant from performing the necessary conditions precedent to the right of recovery."

In other words, the view seems to prevail that if an amendment provides a remedy for the redress of a wrong or for the enforcement of a right where none before existed, the amendment may be regarded as prospective, but if a right to recover existed before, and the amendment relates to procedure and merely prescribes a remedy, the amendment is retroactive.¹³⁵ But in most instances, even though the statute may be given retroactive operation, it is apt to operate harshly. At least, in a penal case, such operation has been deemed a sufficient reason for refusing retrospective effect:

"If the legislature had intended that the amendment . . . operate retroactively, it should so declare and provide a reasonable time thereafter for compliance with its provisions. While placing the food in cold storage on November 28, 1913, was entirely lawful, yet under the amendment, thereafter made to the statute, such storage, continued without any act on the part of the defendant, became unlawful. It is not correct to say that the defendant's offense was wholly after the amendment. He could not have committed the offense at or near the time the information was filed, if he had not had the pigs' feet in cold storage at and prior to the time of the amendment of the statute.¹³⁵

Whether this case be considered directly in point or not, it does indicate the possible effect of retroactive operation, and indicates the desirability of at least allowing those affected by the change in the law to have an opportunity to protect themselves, if the amendment is to operate retrospectively.

¹³⁵ *People v Wendel*, 217 N.Y. 260, 111 N.E. 46, 47.

§ 296. **Repealing Acts, Generally.**¹³⁶—Repealing acts, as a general rule operate retroactively,¹³⁷ and, in the absence of a legislative intention to the contrary, should not be denied that effect.¹³⁸ But even a repealing statute must not interfere with vested rights nor impair the obligations of contracts.¹³⁹ If any other construction is possible, the act should not be construed so as to affect rights which have vested under the old law, or as requiring the abatement of actions instituted for the enforcement of such rights.¹⁴⁰

A repeal will generally, therefore, divest all inchoate rights which have arisen under the repealed statute,¹⁴¹ and destroy all accrued causes of action based thereon.¹⁴² As a result, such a repeal, without a saving clause,¹⁴³ will destroy any proceeding, whether not yet begun, or whether pending at the time of the enactment of the repealing act, and not already prosecuted to a final

¹³⁶ See also § 316, *infra*, for further treatment.

¹³⁷ *Hazzard v Alexander* (Dela.) 173 Atl. 517; *Merle v Johnston City, etc., Co.*, 258 Ill. 328, 101 N.E. 525; *Parr v Paynter*, 78 Ind. Ap. 639, 137 N.E. 70; *Gordon v State*, 4 Kan. 489; *Beljer v Zawadzki*, 252 Mich. 14, 232 N.W. 746; *Westmeyer v Gallenkamp*, 154 Mo. 28, 55 S.W. 231; *Wikel v Jackson County*, 120 N.C. 451, 27 S.W. 117; *Curran v Owens*, 15 W.Va. 208.

¹³⁸ *Hazzard v Alexander* (Dela.) 173 Atl. 517; *Gorley v Sewell*, 77 Ind. 316; *Morgan v Chappie*, 10 Kan. 216; *Blakemore v Cooper*, 15 N.D. 5, 106 N.W. 566; *Common. v Mortgage Trust Co.*, 227 Pa. 163, 76 Atl. 5.

¹³⁹ *Pacific Mail S.S. Co. v Joliffe*, 2 Wall. (U.S.) 450, 17 L.Ed. 805; *Bank v Colquitt County*, 169 Ga. 534, 150 S.E. 841. A right of defense to an action once acquired, cannot be affected by a subsequent repeal. *McGuirr v Pritchard*, 258 Ill. Ap. 467.

¹⁴⁰ *Duke Power Co. v S.C. Tax Comm.*, 81 Fed. (2) 513. Legislation expressly or impliedly repealing earlier statutes, is not to be given retroactive effect, in absence of evidence of contrary intent; *People v Roper*, 259 N.Y. 635, 182 N.E. 213, especially where tax statutes are involved. *Mann v Allen*, 171 N.C. 219, 88 S.E. 235.

¹⁴¹ *Detroit Trust Co. v Allinger*, 271 Mich. 600, 261 N.W. 90.

¹⁴² *Cook v LaVina Land Co.* (Calif.) 39 Pac. (2) 458.

¹⁴³ Generally, saving clauses are used to preserve existing rights. *Lido v Vogel*, 291 N.Y.S. 92. For detailed treatment of such clauses, see *infra* § 300, et seq.

judgment so as to create a vested right.¹⁴⁴ This is true, as the court stated, in *Wall v Chesapeake & Ohio Ry. Co.*,¹⁴⁵ because

“There is no vested right in a public law which is not in the nature of a private grant. However, beneficial an act of the legislature may be to a particular person, or however injuriously its repeal may affect him, the legislature would clearly have the right to abrogate it.”

As in the case of amendments, there is one important distinction which must be kept in mind, and that is the difference between rights dependent upon statute and those which are not. Generally, an action dependent upon a statute falls with its repeal,¹⁴⁶ even

¹⁴⁴ *Billiard Table Mfg. Co. v Bank*, 16 Fed. Supp. 990; *Pittsley v David (Mass.)* 11 N.E. (2) 461; *Clatsop County v Oregon Lumber Co. (Ore.)* 65 Pac. (2) 1 (appeal from board of equalization). And see *Cleveland, etc., R. Co. v Mumford (Ind.)* 197 N.E. 826, where the repeal of a statute during the trial prevented a judgment from being rendered. Similarly, there can be no legal conviction for an offense, unless the act be contrary to law at the time it is committed; nor can there be a judgment, unless the law is in force at the time of the indictment and judgment. “If the law ceases to operate, by its own limitation or by a repeal, at any time before judgment, no judgment can be given. Hence, it is usual in every repealing law to make it operate prospectively only, and to insert a saving clause, preventing the retroactive operation of the repeal and continuing the repealed law in force as to all pending prosecutions, and often as to all violations of the existing law already committed.” *Common. v Marshall (Mass.)* 11 Pick. 350. Also see *Hartung v People*, 22 N.Y. 95.

¹⁴⁵ *Wall v Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 125 N.E. 20.

¹⁴⁶ *Coker v Fountain*, 200 Ala. 95, 75 So. 471; *Byer v Zawadzka*, 252 Mich. 14, 232 N.W. 746; *Globe Publishing Co. v State Bank*, 41 Neb. 175, 59 N.W. 683, 27 L.R.A. 854. But rights accrued are not affected: *Security Bank & Trust Co. v Barnett*, 169 Okla. 298, 36 Pac. (2) 874; *Keystone State Bldg. & Loan Assoc. v Butterfield*, 74 Pa. Super 582; thus, a statute making the breach of the conditions of insurance policies no defense unless the insurer was injured thereby, was not repealed so far as outstanding policies were concerned, as it had become a part of the policies. *Lindemann v American Insurance Co.*, 217 Mich. 698, 187 N.W. 331. Conversely, a contract originally void because of a statutory inhibition, is not validated by the later repeal of the statute. *Grossman v Calonia Land & Imp. Co.*, 103 N.J.L. 98, 134 Atl. 740. Also see *Coast Surety Co. v Municipal Court*, 136 Calif. Ap. 186, 28 Pac. (2) 421, involving forfeiture of penal bond, that the rule that statutory remedies are pursued with full realization that the legislature may abolish the right to recover, is inapplicable to an existing right which has accrued. Nor will the repeal of the habitual criminal act release a defendant convicted and serving a sentence under it. *In re Kline*, 70 Ohio St. 25, 70 N.E. 511. But unless specifically retained, the penalty falls with the repeal of the statute imposing it, since there is then no authority existing for its imposition. *Schuetz' Estate*, 114 Pa. Super. 602, 174 Atl. 832; *Common. v Louisville & N. R. Co.*, 186 Ky. 1, 215 S.W. 938.

after the action thereon has been instituted, in the absence of a saving clause,¹⁴⁷ In other words, rights dependent upon a statute and still inchoate, that is, not perfected by a final judgment, are lost by a repeal of the statute.¹⁴⁸ The following language from *Wall v Chesapeake & Ohio Ry. Company*¹⁴⁹ will give some idea of the effect of a repeal before final judgment has been rendered:

“It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after. If a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision was rendered. The effect of the repeal is to obliterate the statute repealed as completely as if it had never been passed, and it must be considered as a law which never existed, except for the purposes of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law. Pending judicial proceedings based upon a statute cannot proceed after its repeal. This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to announce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal.”

But a different attitude has been taken by the court where a criminal statute was involved:

“Defendant contends that, as the crime was committed before the amendment of the statute requiring his appearance forthwith before the district court, said amendment is *ex post facto* and does not apply to this case, and that he has the right of appeal under the previous provision. This is not an amendment changing the punishment for the crime changed, nor does it alter the situation of the defendant to his disadvantage. It is merely a change of procedure in the right of appeal, and

¹⁴⁷ *Berg v Traeger*, 210 Calif. 323, 292 Pac. 495. This is especially true where the statute creates a cause of action providing a remedy not known to the common law. *Continental Oil Co. v Montana Concrete Co.*, 63 Mont. 223, 207 Pac. 116.

¹⁴⁸ *Byer v Zawadzka*, 252 Mich. 14, 232 N.W. 746.

¹⁴⁹ *Wall v Chesapeake & Ohio Ry. Co.*, 290 Ill. 227, 125 N.E. 20.

as such the appeal is governed by the provisions of the law applicable thereto at the time the judgment was rendered.”¹⁵⁰ Similarly, in *Dunlap v United States*,¹⁵¹ the court refused to apply a statute, which altered a rule of evidence, retrospectively so as to grant a litigant a new trial:

“It is further urged in this respect that a new trial should be granted because, under the recent acts of Congress—amending the statute, the conclusive presumption of good health is removed, and that on a new trial defendant will be permitted to introduce the evidence stricken. Of course, this case was tried under rules of evidence in force at the time of the trial, and any change in the statute since the trial would not govern or apply to rulings and admissibility of evidence accruing at the trial.”

Due to the numerous troublesome problems which constantly arose with the repeal of statutes, as well as to the numerous cases where hardship was caused, statutes have been enacted in several states expressly providing that the repeal of a statute shall not affect any rights, causes of action, penalties, forfeitures, and pending suits, accrued or instituted under the repealed statute.¹⁵² Of course, statutes of this type are highly desirable, for practical as well as for equitable purposes, yet the difficulties and inequities have not been entirely removed. For instance, the term “suit or proceeding” has been held not to extend generally to include appeals;¹⁵³ and such statutes have been held not to apply to suits affecting remedy, as they are intended to protect rights and not privileges.¹⁵⁴ They have also been held not to save the right to

¹⁵⁰ *Abbott v State*, 117 Neb. 350, 220 N.W. 578, 579.

¹⁵¹ *Dunlap v U.S.*, 43 Fed. (2) 999, ap. dis. 45 Fed. (2) 1021. But the parties to an action which has been reversed for a new trial are entitled to the benefits of changes in procedural law made up to the time of the new trial. *Rice v Dunlap*, 205 Calif. 133, 270 Pac. 196.

¹⁵² *Great Northern Ry. Co. v U.S.*, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567; *Kelly v Larkin*, 47 Calif. 58; *Cavanaugh v Patterson*, 41 Colo. 158, 91 Pac. 1117; *Chicago, etc., R. Co. v People*, 136 Ill. Ap. 2; *Denning v Yount*, 9 Kan. Ap. 708, 59 Pac. 1092; *Bell v McCoy*, 136 Mo. 552, 38 S.W. 329; *City of N.Y. v Herdje*, 74 N.Y.S. 104, 68 Ap. Div. 370; *City of Wilmington v Cronley*, 122 N.C. 383, 30 S.E. 9; *Wright Lumber Co. v Hixon*, 105 Wis. 153, 80 N.W. 1110. For a typical statute of this type, see *infra*, §§ 372 and 422.

¹⁵³ *Worley v Pappas (Miss.)* 135 So. 348. “Proceeding” held to mean all the steps or measures adopted in the prosecution or defense of an action. *State ex rel Osage County v Worten (Okla.)* 29 Pac. (2) 1.

¹⁵⁴ *Welton v Iowa State Highway Comm. (Iowa)* 233 N.W. 876.

try a pending cause under a rule of evidence established by the repealed statute.¹⁵⁵ And the words "penalty incurred," in a statute of this character, are to be given their ordinary meaning, which is a punishment brought upon one's self, and therein are especially, if not solely, applicable to criminal cases.¹⁵⁶

¹⁵⁵ *Wheelock v Myers*, 64 Kan. 47, 67 Pac. 632.

¹⁵⁶ *In re Schneck*, 78 Kan. 207, 96 Pac. 43.

CHAPTER XXVI
CONSTRUCTION OF PROVISOS,¹ EXCEPTIONS² AND
SAVING CLAUSES³

- § 297. Provisos, Generally.
- § 298. Void Provisos.
- § 299. Exceptions.
- § 300. Saving Clauses.
- § 301. Some Illustrative Cases.

§ 297. **Provisos, Generally.**—Even though the primary purpose of the proviso is to limit or retrain the general language of a statute,⁴ the legislature, unfortunately, does not always use it with technical correctness. Consequently, where its use creates an ambiguity,⁵ it is the duty of the court to ascertain the legislative intention,⁶ through resort to the usual rules of construction applicable to statutes generally, and give it effect⁷ even though the

¹ For definition of Proviso, see § 91, *supra*.

² For definition of Exception, see § 91, *supra*.

³ For definition of Saving Clause, see § 93, *supra*.

⁴ *People v Andrus*, 299 Ill. 50, 132 N.E. 225; *Castilo v State Highway Comm.*, 312 Mo. 244, 279 S.W. 673; also see § 91, *supra*.

⁵ *McDougal v State*, 183 Ind. 168, 108 N.E. 524. The word "provided" may create a condition, limitation or exception, *State ex rel Board of Comrs. v Bruce (Mont.)* 69 Pac. (2) 97, but not necessarily so, since the word may be used in a conjunctive sense. *Bowers v Mo. Mutual Assn. (Mo.)* 62 S.W. (2) 1058. And note *Interstate Commerce Comm. v Board*, 194 U.S. 25, 24 S.Ct. 563, 48 L.Ed. 860: "The general purpose of the proviso, as is well known, is to except the clause covered by it from the general provisions of the statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided", so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

⁶ *Schwartz v Sacks*, 2 Fed. (2) 188, 55 App. D.C. 87; *Bowman v Industrial Comm.*, 289 Ill. 126, 124 N.E. 373; *Northern Pac. R. Co. v Snohomish County*, 101 Wash. 686, 108 N.E. 524.

⁷ *State v Shaw (Del.)* 192 Atl. 610; *Therrell v Smith (Fla.)* 168 So. 389.

statute is thereby enlarged,⁸ or the proviso made to assume the force of an independent enactment,⁹ and although a proviso as such has no existence apart from the provision which it is designed to limit or to qualify.¹⁰ It should also be construed in harmony with the rest of the statute,¹¹ or, as the court stated in *Foster v United States* (47 Fed. (2) 892):

“It may be said in general that every part of the act must be given effect where it is possible so to do, and that a proviso should, in general be construed as a limitation or qualification upon the otherwise general application of the statute. Whether in a given case the proviso does in fact limit or qualify, and, if so, to what extent, depends primarily on the proviso itself.”

Nevertheless, in seeking the legislative intent or meaning, statutes in *pari materia*,¹² as well as the statute containing the proviso, in its entirety,¹³ should be considered.

As a general rule, however, the operation of a proviso should be confined to that clause or portion of the statute which directly

⁸ *Pennington v U.S.*, 48 Ct. Cl. 408, aff. 231 U.S. 631, 58 L.Ed. 410, 34 S.Ct. 269; *O'Connor v High School Board*, 288 Ill. 240, 123 N.E. 283; *Luce v Rogers*, 181 Mich. 599, 148 N.W. 381; *State v Browne*, 56 Minn. 269, 57 N.W. 659; *Castilo v State Highway Comm.*, 321 Mo. 244, 279 S.W. 673; *Jordan v S. Boston*, 138 Va. 838, 122 S.E. 265. And see *National Bank of Commerce v Cleveland*, 156 Fed. 251; *People v Continental Beneficial Assn.*, 289 Ill. 40, 124 N.E. 352; *Probst v Southern R. Co.*, 139 N.C. 397, 51 S.E. 290; *Hudson v Hopkins*, 75 Okla. 260, 183 Pac. 507, that a proviso may, in effect, be an independent enactment.

⁹ *Royal Mfg. Co. v Spradlin*, 6 Fed. Supp. 98; *Western Machinery Exch. v Gray's Harbor County (Wash.)* 68 Pac. (2) 613.

¹⁰ *Common. ex rel Margiotti v Lawrence*, 326 Pa. 526, 193 Atl. 46. But see *Erdelyi v Erdelyi*, 279 Mich. 282, 271 N.W. 759.

¹¹ *Gullins v State Board (Minn.)* 273 N.W. 703.

¹² *Therrell v Smith (Fla.)* 168 So. 389; *Kelley v Boyne*, 239 Mich. 204, 214 N.W. 316, 53 A.L.R. 273; *Western Machinery Exchange v Grays Harbor County (Wash.)* 69 Pac. (2) 613.

¹³ *People v Andrus*, 299 Ill. 50, 132 N.E. 225; *State v Barrett*, 172 Ind. 169, 87 N.E. 7; *Kelley v Boyne*, 239 Mich. 204, 214 N.W. 316, 53 A.L.R. 273; *Regean v Iron County Court*, 226 Mo. 79, 125 S.W. 1142; *In re Clark*, 119 Neb. 306, 228 N.W. 858; *Traders' Nat. Bank v Lawrence Mfg. Co.*, 96 N.C. 298, 3 S.E. 363; *Jester v Lancaster (Tex. Civ. Ap.)* 266 S.W. 1103; *State v Ripley*, 104 Wash. 299, 176 Pac. 343. Even an unconstitutional proviso is considered in interpreting the section of which it is a part. *Common. v Potts*, 79 Pa. 164.

precedes it in the statute.¹⁴ This position, as suggested in *Clay Center State Bank v McKelvie* (19 Fed. (2) 308), is in accord with the rules of grammatical construction:

"Its grammatical and logical scope is confined to the subject-matter of the principal clause. . . . While it is sometimes used to introduce independent legislation, the presumption is that it is used in accordance with its primary purpose and refers only to the provision to which it is attached."

Nevertheless, this general rule is not always applicable. Although the position of the proviso has considerable influence upon its real character,¹⁵ it is not necessarily controlling. Accordingly, if the meaning and purpose of the proviso is plain, any inference from its position may and should be disregarded.¹⁶ In other words, position cannot supersede the obvious intention of the legislature¹⁷ as ascertained from the context and all the provisions relating to the subject matter involved.¹⁸ It is therefore possible that the proviso may apply to sections or portions thereof which follow the proviso,¹⁹ or to the entire act,²⁰ or, for that matter,

¹⁴ *U.S. v Bernays*, 158 Fed. 792, 86 C.C.A. 52; *Bowman v Industrial Comm.*, 289 Ill. 126, 124 N.E. 373; *Morrison v State*, 181 Ind. 544, 105 N.E. 113; *Sullivan v Bailey*, 125 Mich. 104, 83 N.W. 996; *State ex rel Crow v St. Louis*, 174 Mo. 125, 73 S.W. 623, 61 L.R.A. 593; *Probst v Southern R. Co.*, 139 N.C. 397, 51 S.E. 920; *Zumstein v Mullen*, 67 Ohio St. 382, 66 N.E. 140; *Quannah v White*, 88 Tex. 14, 28 S.W. 1065; *State v Bellew*, 86 Wis. 189, 56 N.W. 782. But note *McDonald v U.S.*, 279 U.S. 12, 49 S.Ct. 218, 73 L.Ed. 582.

¹⁵ *U.S. v R. F. Downing & Co.*, 146 Fed. 56, 76 C.C.A. 376. The intention of the legislature is paramount to form. *Gibbons v Ogden (U.S.)* 9 Wheat. 1; *State v King*, 44 Mo. 283.

¹⁶ *Devers v City of York*, 156 Pa. 359, 27 Atl. 247. Also see *State v Biemer*, 51 Nev. 192, 27 Pac. 656.

¹⁷ *U.S. v R. F. Downing & Co.*, 146 Fed. 56, 76 C.C.A. 376. As a result, a provision affecting a single section is effective as a part thereof, even though it appears elsewhere in the statute. *State ex rel Colmer v Benvenuti*, 162 Miss. 313, 137 So. 537.

¹⁸ *In re Kalana*, 22 Hawaii 96. Also see note 13, *supra*.

¹⁹ *Mechanics, etc., Bank's Appeal*, 31 Conn. 63; *Fouraces v White*, 30 Dela. 25, 102 Atl. 186; *State v St. Louis*, 174 Mo. 125, 73 S.W. 623, 61 L.R.A. 593; *Orlosky v Haskell (Pa.)* 155 Atl. 112; *Galveston, etc., R. Co. v City of Galveston (Tex. Civ. Ap.)* 155 S.W. 273. And see *Kan. Pac. R. Co. v Wyandotte*, 16 Kan. 587; *Folmer's Appeal*, 87 Pa. St. 133, where it was applied to the first clause or provision of the act. That a proviso is not necessarily limited to the cases referred to in that part of an enactment in which it is found, see *McDonald v U.S.*, 279 U.S. 12, 49 S.Ct. 218, 73 L.Ed. 582.

²⁰ *McDonald v U.S.*, 279 U.S. 12, 73 L.Ed. 582, 49 S.Ct. 218; *Bowman v*

even to the original statute of which the statute containing the proviso is an amendment.²¹ After all, it is the legislative intent that controls.

But where the enacting clause is general in its language and purpose, a proviso subsequently following, should be construed strictly,²² and so as to exempt no cases from the enacting clause which does not fairly and clearly fall within its terms,²³ for generally a proviso is to be regarded as restrictive or explanatory and not as extending the scope of the body of the statute.²⁴ In other words, the proviso operates to create special exceptions from the enacting clause, and one who sets up such an exception must

Industrial Comm., 289 Ill. 126, 124 N.E. 373; *State v Webber*, 96 Minn. 348, 105 N.W. 68; *Probst v Southern R. Co.*, 139 N.C. 397, 51 S.E. 920.

²¹ *Ackerman v Marable* (Tenn. Ap.) 95 S.W. (2) 1286.

²² *U.S. v Dickson*, 15 Pet. (U.S.) 141, 10 L.Ed. 689; *Thomas Basham Co. v Lucas*, 21 Fed. (2) 550, aff. 30 Fed. (2) 97; *State Public Utilities Comm. v Early*, 285 Ill. 469, 121 N.E. 63; *Hawkeye Portland Cement Co. v Chicago, etc., R. Co.*, 198 Iowa 1250, 201 N.W. 16; *State v Twin City Tel. Co.*, 104 Minn. 270, 116 N.W. 835; *In re Clark*, 119 Neb. 306, 228 N.W. 858; *Clark Thread Co. v Kearny Township*, 55 N.J.L. 50, 25 Atl. 327; *Montgomery v Martin*, 294 Pa. 25, 143 Atl. 505; *Trice v McGill*, 158 Tenn. 394, 13 S.W. (2) 49; *Jester v Lancaster* (Tex. Civ. Ap.) 266 S.W. 1103; *State v Robinson*, 67 Wash. 425, 121 Pac. 848. And note *New Jersey State Board of Optometrists v S. S. Kresge Co.*, 113 N.J.L. 287, 174 Atl. 353, that provisos are to be strictly but reasonably construed. Accord: *State v Praetorians*, 226 Ala. 259, 146 So. 411. That they should receive a rational construction, see *Kelley v Boyne*, 214 N.W. 316, 239 Mich. 204, 53 A.L.R. 273.

²³ *U.S. v Dickson*, 15 Pet. (U.S.) 141, 10 L.Ed. 689; *Futch v Adams*, 47 Fla. 257, 36 So. 575; *Troxwell v Union County*, 161 Ill. Ap. 173; *State v Hart*, 181 Ind. 592, 105 N.E. 149; *In re Opinion of Justices*, 254 Mass. 617, 151 N.E. 680; *Board of Regents v Auditor Gen.*, 167 Mich. 444, 132 N.W. 1037; *Meyers v Pacific States Lumber Co.*, 122 Ore. 315, 259 Pac. 203; *McKay v Brink* (S.D.) 275 N.W. 72.

²⁴ *State v Shaw* (Dela.) 192 Atl. 610. But see *Interstate Commerce Comm. v Board*, 194 U.S. 25, 24 S.Ct. 563, 48 L.Ed. 860, where the court stated that, since the provision under consideration was intended to enlarge rather than limit the application of the previous terms, it should not receive so narrow a construction as to defeat its purpose. Also note *Foster v U.S.*, 47 Fed. (2) 892, where the court held that the proviso did not limit or qualify the provisions of the act, which after specifying that for certain violations a maximum penalty of five years imprisonment or \$10,000 fine, or both would be imposed, continued, "provided, that it is the intent of congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of law."

establish it as being within both the word and the reason thereof.²⁵ This general rule, however, will not always be applied. For instance, the proviso will be given a liberal construction, and the main clause of the statute given a strict construction, in criminal cases, in favor of the accused.²⁶

The reason why a proviso should be construed strictly generally and as a qualification to the main provision of the enactment is obvious. In the first place, as recognized by the court in *Board of Commissioners v Millikan* (207 Ind. 142, 190 N.E. 185), its true office is not to enlarge or extend but rather to limit or modify. Or, in the language from *Mobile Liners v McConnell* (220 Ala. 562, 126 So. 626):

“If there is any doubt about an exception or proviso in that statute that must be judged on the assumption that the rule is broader than the exception. All doubts and implications should be resolved in favor of the rule.”

And the possible effect of extending the scope of a proviso is pointed out in *Dunn v Bryan* (77 Utah 604, 299 Pac. 253):

“Since the office of a proviso is not to repeal the main provisions of the act but to limit their application, no proviso should be so construed as to destroy those provisions.”

§ 298. Void Provisos.—In at least two instances, the proviso may be void. If it cannot be given sensible effect because of omissions or accidental mistakes in the use of words, it may be entirely disregarded.²⁷ If it cannot be reconciled with the body of the statute,²⁸ it may also be disregarded.²⁹

²⁵ *U.S. v Dickson*, 15 Pet. (U.S.) 141, 10 L.Ed. 689; *Thomas Basham Co. v Lucas*, 21 Fed. (2) 550, aff. 30 Fed. (2) 97.

²⁶ *State v Cunningham*, 90 W.Va. 806, 111 S.E. 835. And note *People v Gill*, 7 Calif. 356. The rule stated in the text is also applicable to statutes penal in their nature. *Bank of U.S. v McKenzie*, Fed. Cas. No. 927. Also see *Forscht v Green*, 53 Pa. 138.

²⁷ *Therrell v Smith* (Fla.) 168 So. 389; *Paterson R. Co. v Grundy*, 51 N.J. Eq. 213, 26 Atl. 788; *Western Machinery Exchange v Grays Harbor County* (Wash.) 68 Pac. (2) 613.

²⁸ *State v Weller*, 171 Ind. 53, 85 N.E. 761; *Renner v Bennett*, 21 Ohio St. 431; *Brown v Hows*, 163 Tenn. 138, 40 S.W. (2) 1017. Also see *Treasurer v Clark*, 19 Vt. 129.

²⁹ *Penick v High Shoals Mfg. Co.*, 113 Ga. 592, 38 S.E. 973; *Idaho Power Co. v Blomquist*, 26 Idaho 222; *State ex rel Bixby v St. Louis*, 241 Mo. 231, 145 S.W. 801; *Gist v Rackliff-Gibson*, 224 Mo. 369, 123 S.W. 921; *Lehigh County v Meyer*, 102 Pa. 479; *McKnight v Hodge*, 55 Wash. 289, 104 Pac. 504, err. dis. 223 U.S. 748, 56 L.Ed. 640, 32 S.Ct. 534. Also see 1 Kent, Comm. 463.

In some jurisdictions, however, where there is irreconcilable repugnancy between the proviso and the body of the statute, the former is given precedence over the latter, on the ground that it is the latest expression of the intent of the legislature.³⁰ As a result, where this rule is applied, the statute may be rendered wholly void or ineffective.³¹ But the soundness of this latter view has been seriously and undoubtedly properly questioned:

"It has not been an infrequent mode of legislation to frame an act containing general language in the enacting clause, and to restrict its operation by a proviso. It would often be found difficult to limit the language in the enacting clause, so as to admit every exception or limitation designed to be introduced into the section in its finished state. If such limitations are to be judged void for repugnance, a great number of statutes must receive such a construction, as will impair or destroy the title to a very great amount of property, as well as a very great number of valuable and important rights. . . . All such saving clauses in the form of a proviso have been considered by judicial tribunals to be valid and effectual. No case will be found which decides otherwise. It is the misapplication of a principle to insist, that such saving clauses in the form of a proviso are void, because their language is repugnant to that contained in the enacting clause."³²

§ 299. **Exceptions.**³³—As we have hitherto stated,³⁴ the appropriate and natural office of the exception is to exempt something from the scope of the general words of a statute, which

³⁰ *Merchants Nat. Bank v U.S.*, 214 Fed. 200, 130 C.C.A. 548; *Arnett v State*, 168 Ind. 180, 80 N.E. 153; *Campbell v Jackman Bros.*, 140 Iowa 475, 118 N.W. 755; *Portland Sav. Inst. v Makin*, 23 Me. 360; *Van Horn v State*, 46 Neb. 62, 64 N.W. 365; *Pierson v Cady*, 84 N.J.L. 54, 86 Atl. 167; *People v Scannell*, 172 N.Y. 316, 65 N.E. 165; *Orinoco Supply Co. v Masonic & Eastern Star Home*, 163 N.C. 513, 79 S.E. 964; *Olson v Heisen*, 90 Ore. 176, 175 Pac. 859; *Britt v Cook*, 157 Tenn. 54, 6 S.W. (2) 322.

³¹ *Gerstung v Sauer*, 82 N.J.L. 68, 80 Atl. 993; *Orinoco Supply Co. v Masonic & Eastern Star Home*, 163 N.C. 513, 79 S.E. 964.

³² *Savings Institution v Makin*, 23 Me. 320. Also see *Arnett v State*, 168 Ind. 180, 80 N.E. 153; *Clark Thread Co. v Kearney*, 55 N.J.L. 50, 26 Atl. 327; *Renner v Bennett*, 21 Ohio St. 431. And particularly note *Roseberry v Norsworthy*, 135 Miss. 845, 100 So. 514. That the proviso should not be construed to destroy the general provisions of a statute, see *Bird & Jex Co. v Funk (Utah)* 85 Pac. (2) 831.

³³ For definition and comparison with the proviso, see § 91, *supra*.

³⁴ See § 91, *supra*.

would otherwise be within the scope and meaning of such general words. Consequently, the existence of an exception in a statute clarifies the intent that the statute should apply in all cases not excepted.³⁵

Unlike that of the proviso,³⁶ however, it is apparent that the position of the exception in the statute, is unimportant.³⁷ But the exception is also subject to the rule of strict construction,³⁸ that is, any doubt will be resolved in favor of the general provision and against the exception,³⁹ and anyone claiming to be relieved from the statute's operation must establish that he comes within the exception.⁴⁰ Indeed, the liberal construction of a statute would, in many instances, seem to require that the exception, by which the operation of the statute is limited or abridged, should receive a restricted construction.⁴¹

Where, however, a criminal or penal statute is involved, the exception must receive a liberal construction in favor of the

³⁵ *Broughton v Humble Oil Co. (Tex.)* 105 S.W. (2) 480.

³⁶ See *supra*, § 297, and especially note 14, et seq.

³⁷ See *State v Schlitz Brewing Co.*, 104 Tenn. 715, 59 S.W. 1033; but note *Megan v Boyd County*, that although an exception in a statute will be held to apply to the clause, or sentence, immediately preceding it, the rule is not unbending. Also see *Common. v Kelley*, 177 Mass. 221, 58 N.E. 691, where in case of doubt, it was held that an exception presumptively modifies the nearest antecedent.

³⁸ *U.S. v Union Pac. R. Co.*, 20 Fed. Supp. 665; *Piedmont, etc., R. Co. v U.S.*, 30 Fed. (2) 421; *Merchants Nat. Bank v Continental Nat. Bank*, 98 Calif. Ap. 523, 277 Pac. 354; *Williams v Seaboard Air Line Ry. Co.*, 33 Ga. Ap. 164, 125 S.E. 769; *State v Breckenridge*, 219 Mo. Ap. 587, 282 S.W. 149; *Sinking Spring Water Co. v Gring*, 26 Pa. Dist. 867. But note *Kroff v Amrhein*, 94 Ohio St. 282, 114 N.E. 267, and *Mitchell Prod. Co. v Manison*, 63 S.D. 127, 257 N.W. 47. That exceptions should be strictly but reasonably construed, *New Jersey State Board of Optometrists v S. S. Kresge Co.*, 113 N.J. L. 287, 174 Atl. 353. Also see *Banks v Chase Securities Corp. (Mass.)* 10 N.E. (2) 472, that an exception from a statutory prohibition is not to be construed more broadly than the prohibition.

³⁹ *Eddington v Northwestern Bell Tel. Co.*, 201 Iowa 67, 202 N.W. 374; *New Jersey State Board of Optometrists v S. S. Kresge Co.*, 181 Atl. 152, 115 N.J.L. 495.

⁴⁰ *U.S. v Union Pac. R. Co.*, 20 Fed. Sup. 665; *Canadian Pac. Ry. Co. v U.S.*, 73 Fed. (2) 831. Also see *Bragg v Clark*, 50 Ala. 363; *Looker v Davis* 47 Mo. 140.

⁴¹ *Bragg v Clark*, 50 Ala. 363; *Epps v Epps*, 17 Ill. Ap. 196.

defendant.⁴² Similarly, an exception appearing in a statute which imposes a burden on the public, must also be given a liberal construction in favor of the public.⁴³

Why should an exception generally be confined or restricted as closely as possible? In the first place, the existence of an express exception naturally excludes all others.⁴⁴ In fact, the court must assume that the legislature did not intend to create any other exceptions than those stated in the statute.⁴⁵ As the court points out in *People v Deep Rock Oil Corp.* (343 Ill. 388, 175 N.E. 572), this is required by virtue of the rule *expressio unius exclusio alterius*. The rule was applied in *National Life & Acc. Ins. Co. v Dempster* (168 Tenn. 446, 79 S.W. (2) 564):

“The contention is that the portion of appellant’s net earnings arising from tax free bonds must be excluded in calculating the amount of excise tax due by it. The statute itself authorizes no such exclusion. The only earnings excluded by the terms of the statute are those arising from interstate commerce. The enumeration of exceptions to a general rule excludes by necessary implication, all other exceptions.”

On the other hand, the exemption of a matter from the statute’s general language, reveals that otherwise it would have been within the scope or operation of the statute;⁴⁶ that is, an exception

⁴² *Schuyler v Southern Pac. Co.*, 37 Utah 581, 109 Pac. 458, reh. den. 37 Utah 612, 109 Pac. 1025, aff. 227 U.S. 601, 33 S.Ct. 277, 57 L.Ed. 662, 43 L.R.A. (N.S.) 901.

⁴³ *Marin Municipal Water Dist. v Chenu*, 188 Calif. 734, 207 Pac. 251.

⁴⁴ *Equitable L. Assur. Soc. v Clements*, 140 U.S. 226, 35 L.Ed. 497, 11 S.Ct. 822; *Rothschild v Superior Court* (Calif. Ap.) 293 Pac. 106; *People v Deep Rock Oil Corp.*, 343 Ill. 388, 175 N.E. 572; *Kroff v Amrhein*, 94 Ohio St. 282, 114 N.E. 267; *Turner v Eslick*, 146 Tenn. 236, 240 S.W. 786; *Holmes v Coalson* (Tex. Civ. Ap.) 154 S.W. 661; *State v Vosgien*, 82 Wash. 685, 144 Pac. 947; *In re Cadwell’s Estate*, 26 Wyo. 412, 186 Pac. 499. Others will not be included by implication. *Brahmey v Rollins* (N.H.) 179 Atl. 186; *Wade v Madding*, 161 Tenn. 88, 28 S.W. (2) 642. But note *New York Indemnity Co. v Industrial Comm.*, 86 Colo. 364, 281 Pac. 740, that “reason and justice” may be considered.

⁴⁵ *Purvis v Lamar County*, 161 Miss. 454, 137 So. 323; *Tobin v Estes* (Tenn.) 79 S.W. (2) 550.

⁴⁶ *Arnold v U.S.*, 147 U.S. 494, 13 S.Ct. 406, 37 L.Ed. 253; *Washington v Atlantic, etc., R. Co.*, 136 Ga. 638, 71 S.E. 1066; *Common. v Summerville*, 204 Pa. 300, 54 Atl. 27; *Turner v Eslick*, 146 Tenn. 236, 240 S.W. 786. Also see *Rothchild v Superior Court*, 109 Calif. Ap. 345, 293 Pac. 106.

in a statute makes the legislative intent plain that the statute should apply in all cases not excepted.⁴⁷

Of course, the exception may be considered in construing the meaning of the statute proper,⁴⁸ as each obviously constitutes an integral part of the statute. Moreover, an exception may be read into the terms of an ambiguous statute,⁴⁹ although an exception cannot add to the terms of the statute.⁵⁰ Nor can the court construe an exception so as to make it ambiguous or meaningless, when a reasonable construction can be given to it.⁵¹ And, in the event the body of the statute is irreconcilable with the exception, the latter, according to the best reasoned authorities, is void.⁵²

§ 300. Saving Clauses.⁵³—As we have stated elsewhere,⁵⁴ the saving clause is used to exempt something from immediate interference or destruction. It is generally used in repealing statutes in order to prevent them from affecting rights accrued, penalties incurred, duties imposed, or proceedings started under the statute sought to be repealed.⁵⁵ Its position or verbal form is unimportant.⁵⁶ But if it is in irreconcilable conflict with the body of the statute of which it is a part, it is ineffective,⁵⁷ or void.⁵⁸ And whether the saving clause should receive a strict or liberal construction, is a matter upon which there seems to be some conflict

⁴⁷ *Gulf, etc., Ry. Co. v Temple Grain Co. (Tex.)* 58 S.W. (2) 47.

⁴⁸ *Batcheller-Durkee v Batcheller*, 39 R.I. 45, 97 Atl. 378.

⁴⁹ *Brady v Cooper*, 46 S.D. 419, 193 N.W. 246.

⁵⁰ *Batcheller-Durkee v Batcheller*, 39 R.I. 45, 97 Atl. 378.

⁵¹ *Mitchell v Board of Educ.*, 201 N.C. 55, 158 S.E. 850.

⁵² *Clelland v Ker*, 6 Ir. Eq. 35; also see *Bird & Jex Co. v Funk (Utah)* 85 Pac. (2) 831. But, contra, that the exception must be given effect, even if it destroys the body of the statute in its entirety. *Campbell v Jackman*, 140 Iowa 475, 118 N.W. 755.

⁵³ For definition see § 91, *supra*.

⁵⁴ See §§ 91 and 296, *supra*.

⁵⁵ For discussion of this use of the saving clause, see § 296, *supra*.

⁵⁶ *Shutt v State*, 173 Ind. 689, 89 N.E. 6. But see *Savings Institution v Makin*, 23 Me. 360.

⁵⁷ *Jackson v Moye*, 33 Ga. 296; *Shutt v State*, 173 Ind. 689, 89 N.E. 6; *Clark Thread Co. v Kearney*, 55 N.J.L. 50, 25 Atl. 327; *Jensen v F. W. Woolworth Co.*, 92 N.J.L. 529, 106 Atl. 808; *Looney v Common.*, 145 Va. 825. Also see *Nichol v Board of Education*, 211 N.Y.S. 749, 125 Misc. 678.

⁵⁸ *Blackstone Commentaries*, 89. Compare this rule with that applicable to provisos. See § 298, *supra*.

of opinion.⁵⁹ Perhaps the best rule would make the nature of the construction of the saving clause depend upon the nature of the statute involved—for example, whether it was remedial, penal, or procedural.⁶⁰

If the saving clause is a general one, that is, applicable to all repealing acts, it is considered as merely declaratory of a rule of construction.⁶¹ But whether they are general or not, they are regarded as much a part of every repealing act as if written therein.⁶² Nevertheless, they are subject to repeal by subsequent acts;⁶³ that is, they will not save from repeal any provision whose repeal is clearly intended by the legislature by the later act.⁶⁴ To hold otherwise would abridge or limit the legislative power of the various later legislatures,⁶⁵ by the enactment of irrepealable legislation.⁶⁶

§ 301. Some Illustrative Cases.—A few illustrative cases will assist in revealing the manner in which the courts construe saving clauses. For instance, in *Jones v State*,⁶⁷ a criminal statute was before the court for construction.

“We think it, then, quite manifest, that unless there is some exception to the general repeal, by virtue of section 28 of the Code, above quoted, whereby the power to punish offenses against the act of 1839 is reserved, that that power is gone. Unless the power to punish the offense, is reserved affirma-

⁵⁹ Favoring strict construction, see *Devonshire v O'Connor* (Eng.) 24 Q.B.D. 468. Also note *State v Brady*, 102 Tex. 408, 118 S.W. 128. Favoring liberal construction, see *Matter of Ankrim*, 1 Fed. Cas. No. 395 (bankruptcy law).

⁶⁰ See § 238, *supra*.

⁶¹ *U.S. v Chicago, etc., R. Co.*, 151 Fed. 84, aff. 162 Fed. 835, cert. den. 212 U.S. 579, 29 S.Ct. 689, 53 L.Ed. 659; *Neilson v Perkins*, 86 Conn. 425, 85 Atl. 686.

⁶² *State v Shepherd*, 202 Iowa 437, 210 N.W. 476. In Kansas, general saving clauses mentioning pending cases only, have been held inapplicable to statutes having specific saving clauses, *State v Showers*, 34 Kan. 269, 8 Pac. 474, and in Indiana they are regarded as supplementing the saving clauses in special statutes. *Indianapolis v Morris*, 25 Ind. Ap. 409, 58 N.E. 510.

⁶³ See *Jones v State*, 1 Iowa 395.

⁶⁴ *Cortelyn v Anderson*, 73 N.J.L. 427, 63 Atl. 1095.

⁶⁵ *U.S. v Standard Oil Co.*, 148 Fed. 719.

⁶⁶ See § 133, *supra*.

⁶⁷ *Jones v State*, 1 Iowa 395.

tively, it would cease with the act that created it. If reserved affirmatively, as was this by the act of 1843, it would cease when the act reserving it was repealed.

But it is claimed that section 32 of the Code of 1851, does furnish such exception. The language there used is, "no offense committed, and no penalty or forfeiture incurred, under any act hereby repealed, shall be affected by the repeal". This provision undoubtedly reserves the right to punish any offense committed under any act repealed by the Code; but the offense here charged, was not committed under an act repealed by the act of the code; for the act under which it was committed, was repealed by the act of 1848. But it may be said that this is giving to the statute a construction too literal. It must be remembered, however, that penal statutes, particularly in favor of life, or which is much about the same thing, liberty for life, should be construed strictly in bringing the case within the scope of the act. But it is also claimed, that the intention of the legislature, was to reserve the right to punish offenses liable to be punished under any former act at the time of the adoption of the code, and not simply offenses repealed by it. It would have been very easy for the legislature to have provided, that the repeal should not affect any offense committed before the time of the repeal, as is provided in section 31 immediately preceding the one under consideration, which is an exception in relation to civil matters from this same general repeal; the language there used being: "This repeal of existing acts, shall not affect any act done," etc., before the time when such repeal takes effect, etc. But it saw proper to provide otherwise. If allowed to speculate upon what was in the mind of the legislature, while much might be said on the one hand, as to the offense being one which has been always excepted from limitation laws, and the like argument, going to show that the legislature never intended to relinquish the right to punish such offense; on the other hand, it may be urged with equal plausibility, that a legislature, in adopting an entirely new set of laws, has a perfect right to determine how far back in the past, courts shall go to punish public offenses. . . . Again; if this construction should not be entirely clear—should it even admit of a doubt only—the prisoner is entitled to the benefit of such doubt."

In *Great Northern Railway Company v United States*,⁶⁸ the question arose whether the Hepburn law repealed the Elkins act so as to deprive the government of the right to prosecute for violations of the latter committed before the Hepburn law was passed. Said the court:

⁶⁸ *Great Northern Railway Co. v U.S.*, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567. Also see *Hertz v Woodman*, 218 U.S. 205, 30 S.Ct. 621, 54 L.Ed. 1001.

"The difficulty of construction, if any, arises from the words following the general repealing clause: 'but the amendments herein provided for shall not affect causes now pending in the courts of the United States, but such causes shall be prosecuted to conclusion in the manner heretofore provided by law'. These words, we think, do not, expressly or by fair implication, conflict with the general rule established by section 13, Rev. St.,⁶⁹ since by their very terms they are concerned with the application to proceedings pending in the courts of the United States of the new methods of procedure created by the Hepburn law. Any other construction would necessitate expunging the words 'shall be prosecuted to a conclusion in the manner heretofore provided by law'. This follows, because if it were to be held that the intent and object of the lawmaker in dealing with cases 'pending in the courts of the United States,' was solely to depart to all but such pending cases from the general rule of Rev. St. section 13, then the provision as to future proceedings would be unnecessary, because the old and unrepealed as well as the newly enacted remedies would be applicable, as far as pertinent, to such pending cases. The provision commanding that the new remedies should not be applicable to causes then pending in the courts of the United States gives significance to the whole clause and serves to make clear the fact that the legislative mind was concerned with the confusion and uncertainty which might be begotten from applying the new remedies to causes then pending in the courts, and demonstrates therefore that this subject, and this subject alone, was the matter with which the provision in question was intended to deal. In other words, when the object contemplated by the provision is accurately fixed the subject is freed from difficulty, and not only the letter but the spirit of the provision becomes clear; that is to say, it but manifests the purpose of Congress to leave cases pending in the courts to be prosecuted under the prior remedies, thus causing the new remedies created to be applicable to all controversies not at the time of the passage of the act pending in the courts."

⁶⁹ "Sec. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

CHAPTER XXVII

CONSTRUCTION OF AMENDATORY ACTS.¹

- § 302. Applicability of General Principles of Construction.
- § 303. Principles Particularly Applicable to Amendments.
- § 304. Principles Particularly Applicable to Amended Statute.
- § 305. Repeals by Amendment.
- § 306. Retroactive Construction.

§ 302. **Applicability of General Principles of Construction.**—Of course, amendments or amendatory statutes are subject to the rules and principles of construction applicable to original enactments. For instance, the only legitimate recourse to construction is to ascertain the legislative intention.² In ascertaining this intent, the court may not only examine the body of the statute, but its caption.³ Statutes in *pari materia* may also be resorted to for assistance.⁴ Executive⁵ as well as judicial⁶ construction may likewise be of assistance. And the evil sought to be remedied by the amendment may be considered as some indication of the legislative

¹ For enactment of amendments, see *supra*, Chapt. XII; for other treatment of the construction of amendatory acts, see Black, *Int. Laws*, §§ 165-170.

² *State ex rel Bernero v McQuillan*, 246 Mo. 517, 152 S.W. 347; *Homnyack v Prudential Ins. Co.*, 194 N.Y. 456, 87 N.E. 769; *Kelly v Anderson*, 38 Wyo. 97, 264 Pac. 1033.

³ *Winder v King (Tex.)* 297 S.W. 689, *aff'd* 1 S.W. (2) 587.

⁴ *Grady Drainage Dist. v Free*, 178 Ark. 346, 10 S.W. (2) 854; *Grimes v Reynolds*, 184 Mo. 679, 83 S.W. 1132.

⁵ *U.S. v Payne*, 30 Fed. (2) 960 (unless there has been a substantial change in the language.)

⁶ *In re Forst*, 9 Fed. (2) 128, 12 Fed. (2) 1; *Hoffman v McNamara*, 102 Calif. Ap. 280, 232 Pac. 990; *People v Ill. Central R. Co.*, 314 Ill. 373, 145 N.E. 731; *State v Dorsey*, 184 Ky. 90, 211 S.W. 418; *Webber v Granville Chase Co.*, 117 Me. 150, 103 Atl. 13; *McEvoy v Sault Ste. Marie*, 136 Mich. 172, 98 N.W. 1006; *State ex rel Dean v Daues*, 321 Mo. 1126, 14 S.W. (2) 990; *In re Cole's Estate*, 235 N.Y. 48, 138 N.E. 733; *Spitzer v Stillings*, 109 Ohio St. 297, 142 N.E. 365; *Williams Admr. v Dean*, 144 Va. 831, 131 S.E. 1. Indeed, amendments are presumed to be passed in view of the previous constructions of the statute by the supreme court. *Williams' Admr v Dean*, 144 Va. 831, 131 S.E. 1.

intent.⁷ Grammatical errors,⁸ and omissions,⁹ if the legislative intent is ascertainable, will not invalidate the amendment.

§ 303. Principles Particularly Applicable to Amendments.—

Since an amendment becomes a part of the original statute,¹⁰ both must be construed together as if they constituted one enactment,¹¹ even if the amendment occurs merely by implication.¹² Their provisions should be harmonized, if possible,¹³ but where there is irreconcilable conflict, the provisions of the amendment must prevail

⁷ *Miner v Stafford*, 239 Ill. Ap. 346; *People v Gould*, 237 Mich. 156, 211 N.W. 346; *Armor v Lewis*, 252 Mo. 568, 161 S.W. 251; *Union Pac. R. Co. v. Heuer*, 97 Neb. 436, 150 N.W. 259; *Williamson Real Estate Co. v Sasser*, 179 N.C. 497, 103 S.E. 73; *West v Lysle*, 302 Pa. 147, 153 Atl. 131; *State v Cantara*, 50 R.I. 440, 148 Atl. 415; *State v Superior Court*, 176 Wis. 748, 186 N.W. 748. "It is to be presumed that the legislature enacted this amendment with a full knowledge of the existing conditions of the common law and of statutes with respect to the subject matter. In determining the effect and meaning of the amendatory act, the court with this presumption in mind may look to the historical setting, the public policy of the state, the conditions of its laws, the objects to be promoted, and any other fact throwing light on the purpose and intention of the legislature." *Cruther Dental Depot v Miller*, 251 Ky. 201, 64 S.W. (2) 466, 468.

⁸ *Northern Pac. Express Co. v Metscham*, 90 Fed. 80, 32 C.C.A. 530; *Patton v People*, 229 Ill. 512, 82 N.E. 386; *State v Woolard*, 119 N.C. 779, 25 S.E. 719. Also see *State v Bailey*, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435.

⁹ *Murphy v Salem*, 49 Ore. 54, 87 Pac. 532.

¹⁰ *U.S. v La Franca*, 282 U.S. 568, 75 L.Ed. 551, 51 S.Ct. 278; *Adams v Bergen County (N.J.)* 179 Atl. 685. Also see § 304, *infra*. For discussion of the problem of whether the repeal of a statute repeals its amendments, see *Blake v Brackett*, 47 Me. 28.

¹¹ *Atlantic Coast Line R. Co. v Amos*, 94 Fla. 588, 115 So. 315; *People v Lloyd*, 304 Ill. 23, 136 N.E. 505; *State v Anderson*, 117 Kan. 540, 232 Pac. 238; *Gagnon's Case*, 228 Mass. 334, 117 N.E. 321; *Attorney General v Lewis*, 151 Mich. 81, 114 N.W. 927; *Brown v State*, 323 Mo. 138, 19 S.W. (2) 12; *Campbell v Youngson*, 80 Neb. 322, 114 N.W. 415, *aff.* 82 Neb. 743, 118 N.W. 1053; *Morgan v Hedstrom*, 164 N.Y. 224, 58 N.E. 26; *Williams Real Estate Co. v Sasser*, 179 N.C. 497, 103 S.E. 73; *State v Oliver*, 162 Tenn. 100, 35 S.W. (2) 296, 38 S.W. (2) 1110.

¹² *Coal, etc., R. Co. v Conley*, 67 W.Va. 129, 67 S.E. 613.

¹³ *Smith v Board of Trustees*, 198 Calif. 301, 245 Pac. 173; *Atty.-Gen. v Lewis*, 151 Mich. 81, 114 N.W. 927; *State v Coupe*, 91 Neb. 463, 136 N.W. 41; *Zelig v Blue Point Oyster Co.*, 54 Ore. 543, 104 Pac. 193; *Yett v Cook*, 115 Tex. 205, 281 S.W. 837.

over those of the original statute on the theory that the former constitutes the last expression of the will of the legislature.¹⁴

§ 304. Principles Particularly Applicable to Amended Statute.

—The amended statute should also be construed as if it had been originally passed in its amended form,¹⁵ since the amendment becomes a part of the original enactment.¹⁶ And words used in the original statute should, at least, be presumed to be used in the same sense in the new statute.¹⁷ Conversely, a change in the phraseology creates a presumption that the legislature intended a change of meaning.¹⁸ Indeed, the mere fact that the legislature enacts an amendment is of itself an indication of an intention, as a general rule, to alter the pre-existing law.¹⁹ A portion of an amended stat-

¹⁴ *State v Burr*, 113 N.W. 705, 16 N.D. 581; *State v Anderson*, 191 Wis. 538, 211 N.W. 938; *Kelly v Anderson*, 38 Wyo. 97, 264 Pac. 1033.

¹⁵ *U.S. v La France*, 282 U.S. 568, 51 S.Ct. 278, 75 L.Ed. 551; *People v Boykin*, 298 Ill. 11, 131 N.E. 133; *Epperson v New York Life Ins. Co.*, 90 Mo. Ap. 432; *State v Vendetta*, 86 W.Va. 186, 103 S.E. 53. Also see *Pomeroy v Beach*, 149 Ind. 511, 49 N.E. 370; *Woodall v Boston Elevated Ry. Co.*, 192 Mass. 308, 78 N.E. 446; *In re Locust Avenue*, 185 N.Y. 115, 77 N.E. 1012. But the re-enactment of an amended act, without any mention of the amendment, does not operate as a repeal of the latter. *Powell v King (Minn.)* 80 N.W. 850.

¹⁶ *State v Moon*, 178 N.C. 715, 100 S.E. 806. At least, the parts unrepealed in the amendatory statute should be regarded as a continuance of existing law. *People v Shader*, 326 Ill. 145, 157 N.E. 225.

¹⁷ *Robbins v Omnibus R. Co.*, 32 Calif. 472; *Browne v Turner*, 174 Mass. 150, 54 N.E. 510; *American Surety Co. v Axwell Co. (Tex. Com. Ap.)* 36 S.W. (2) 715, 38 S.W. (2) 1110; *State v Tobin*, 31 Wyo. 355, 226 Pac. 681.

¹⁸ *Hoffman v McNamara*, 102 Calif. Ap. 280, 282 Pac. 990; *State v Brannon*, 86 Mont. 200, 283 Pac. 202, 67 A.L.R. 1020; *People v Warden*, 215 N.Y.S. 110; *Rieger v Harrington*, 102 Ore. 603, 203 Pac. 576; *Common. v Lowe*, 296 Pa. 359, 145 Atl. 916; *In re Dwyer*, 49 S.D. 350, 207 N.W. 210. But a mere change in the words of the statute will not change the law, unless it appears to be the intent of the legislature to do so. *State v Hayes*, 86 Mont. 58, 282 Pac. 125. As a result, a change will be presumed when there is a material change in the language. *In re Phillips Estate (Wash.)* 74 Pac. (2) 1015.

¹⁹ *U.S. v Southern Pac. Co.*, 230 Fed. 270; *City of Stamford v Town of Stamford*, 107 Conn. 596, 141 Atl. 891; *Eversole v Eversole*, 169 Ky. 793, 185 S.W. 487; *Mabie v Fuller*, 255 N.Y. 194, 174 N.E. 450; *Southern Ry. Co. v U.S. Casualty Co.*, 136 Va. 475, 118 S.E. 266. But no further than is expressed or necessarily implied from the language used. *Rawn v Hotel Corp.*, 213 N.Y.S. 333, 126 Misc. 247.

ute, however, which has been left unchanged is not affected by the amendment.²⁰ And obviously, in the absence of a contrary intention, an amendatory statute will not have a wider scope than the original statute,²¹ but should be construed to have the same operation.²² For instance, where an act purports to amend a particular section of a general law, it is limited in its scope to the subject matter of the section proposed to be amended.²³ And as we have already indicated,²⁴ the previous judicial construction becomes a part of the amended statute, where the terms construed are retained in a subsequent amendment.²⁵ In fact, it may be presumed that the legislature intended to adopt the prior construction of the unamended portions.²⁶ Moreover, in construing the amended statute, the court should consider the change sought to be affected by the legislature.²⁷ The amendatory act should be construed in relation to the condition created by the amended act as well as the objects and purposes of the act itself as therein defined.²⁸ In short, regard must be had for the law as it was before being amended,²⁹ and the amendatory act should be construed to repress the evils under the old law and to advance the remedy provided by the amendment.³⁰

When the legislature declares that an existing statute shall be amended "to read as follows", the legislature thereby evinces an intention to make the new statute a substitute for the amended statute exclusively, and only those portions of the amended statute

²⁰ *Thompson v Mossburg*, 194 Ind. 570, 141 N.E. 241; *State ex rel Dean v Daves*, 321 Mo. 1126, 14 S.W. (2) 990; *People v McFall*, 158 N.Y.S. 974.

²¹ *U.S. v Crawford*, 6 Mackey (D.C.) 319.

²² *Chase v U.S.*, 7 App. D.C. 149.

²³ *State ex rel Board of Education v Morley*, 168 Okla. 259, 34 Pac. (2) 258.

²⁴ See *supra*, § 224.

²⁵ *People ex rel Nelson v Wiersema St. Bank*, 361 Ill. 75, 197 N.E. 537.

²⁶ *State ex rel Dean v Daves*, 321 Mo. 1126, 14 S.W. (2) 990; also see *Stover Bank v Welpman*, 323 Mo. 334, 19 S.W. (2) 740.

²⁷ *In re Gellis' Estate*, 252 N.Y.S. 725, 141 Misc. 432.

²⁸ *Doyle v Electric Comrs.*, 261 Mich. 546, 246 N.W. 220.

²⁹ *People v Johnson*, 270 Mich. 622, 259 N.W. 343.

³⁰ *State v Hayes*, 86 Mont. 58, 282 Pac. 32.

repeated in the new one are retained.³¹ But where an amendment relates to other matters than those of the amended statute, the amendment or amendatory statute will be given the same meaning that it had before, for it is apparent that the legislature did not intend to alter it.³² And the general provisions in an amendatory statute will not ordinarily be interpreted as amending the specific provisions of the act subjected to amendment.³³ Moreover, the clear intent of the amending clause of a statute must prevail over contradictory provisions within any section thereof.³⁴ And where the phrase "this act" appeared in the amended section of a statute, it will generally refer to the original as well as to the amending act,³⁵ although, of course, in order to remove any ambiguity in an amendment, the entire act should be consulted.³⁶

³¹ *State ex rel Nagle v Leader Co.*, 97 Mont. 586, 37 Pac. (2) 561. "In *State v Ingersoll*, 17 Wis. 631, this court decided that where a statute provides that a certain section of a former statute shall be 'amended so as to read as follows', etc., any provision of such section not found in the new statute is repealed. It follows very clearly from that decision, that, whatever provision of the former statute was in force after the amendment of 1868, it was so in force because of being found in the amendatory act, and that if all or substantially all of the former section continued to be the law, it was merely by reason of its having been copied into and reenacted with the amendment. The original section, as an independent and distinct statutory enactment, ceased to have any existence the very moment the amendatory act was passed and went into effect, and whatever provisions of it remained as law were such solely by virtue of being again enacted in the amendment. The original section, as a separate statute, was as effectually repealed and obliterated from the statute book, as if the repeal had been made by direct and express words, and none of its provisions had been re-enacted. Such being the operation of the act of 1868, the conclusion as to the operation of that of 1869 is not difficult. It repealed the whole of the act of 1868, as well as that part which re-enacted the provisions of the original section as the part which was added to those provisions. How such repeal can be severed, and said to apply only to that portion of the act of 1868, which was new, and not to affect that portion which was old or borrowed from the provisions of the previous statute, is certainly not easy to be perceived." *Goodno v City of Oshkosh*, 31 Wis. 127.

³² *Barber v Palo Verde Mut. Water Co.*, 198 Calif. 649, 246 Pac. 1044.

³³ *U.S. v Hogan*, 21 (U.S.) Ct. Cust. Ap. 121.

³⁴ *U.S. Fidelity & Guar. Co. v Anderson*, 38 Wyo. 88, 264 Pac. 1030.

³⁵ *State v Anderson*, 117 Kan. 540, 232 Pac. 238, aff. 117 Kan. 117, 230 Pac. 315.

³⁶ *Pontius v McLain* (Calif.) 298 Pac. 541.

§ 305. **Repeals by Amendment.**—As is quite obvious, an amending act or statute may also operate as a repeal.³⁷ This will be true where the provisions of the statute subject to the amendment are in irreconcilable conflict.³⁸ It will also be true where the amendment is intended to be a substitute for the existing law.³⁹ In the former instance, the repeal will take place to the extent that the provisions of the old law are changed or rendered repugnant to the new act.⁴⁰ But in the latter instance, there is no need for inconsistency in order for the amendment to operate as a repeal.⁴¹ Moreover, an amendatory act which purports to set out in full all that it intends to contain, operates as a repeal of anything omitted which was contained in the old act and not included in the amendatory act.⁴² Similarly, where the language of the statute as amended is set out in full in an act beginning with the expression that it is amended “to read as follows,” the old law is not repealed except as to those parts omitted which are inconsistent with the amendment, the remainder of the act being a continuation of the original law.⁴³ Summarizing, where the amendatory act operates as a repeal, of course, the rules which apply to repealing acts also apply, as is apparent from the foregoing discussion.⁴⁴

The manner in which an amendment will operate to repeal existing law may be gathered from the case of *United States v Tynen*.⁴⁵

“Pending the action brought under this section against the defendants, Congress, in 1850 (9 Stat. 462) passed an act amendatory of and supplementary to the act of February, 1793, the seventh section of which embraces the offenses specified

³⁷ *People v Zito*, 237 Ill. 434, 86 N.E. 1041; *Goodno v City of Oshkosh*, 31 Wis. 127. (“The original section, as an independent and distinct statutory enactment, ceased to have any existence the very moment the amendatory act was passed and went into effect.”)

³⁸ *McDowell v Fuller*, 169 Mich. 332, 135 N.W. 265; *Jacobus v Meskill*, 56 N.J.L. 255; *People v Angle*, 109 N.Y. 564, 17 N.E. 413.

³⁹ *Lowe v Bourbon County*, 5 Kan. Ap. 603, 51 Pac. 579; *Vanderveer v Herbert*, 76 N.J.L. 173, 68 Atl. 909; *Taylor v State*, 87 Tex. Cr. 330, 221 S.W. 611.

⁴⁰ *Nelden v Clark*, 20 Utah 382, 59 Pac. 524.

⁴¹ *Camley v Stanfield*, 10 Tex. 546.

⁴² *State v McCafferty*, 25 Okla. 2, 105 Pac. 992. Also see *Great Northern R. Co. v U.S.*, 155 Fed. 945; *State v Beck*, 139 Wis. 37, 119 N.W. 300.

⁴³ *People v Montgomery County*, 67 N.Y. 109; *Reid v Smoulter*, 128 Pa. St. 324, 18 Atl. 445, 5 A.L.R. 517. And see cases under note 42, *ibid*.

⁴⁴ For discussion of such rules, see § 307, *et seq.* *infra*.

⁴⁵ *United States v Tynen (U.S.)* 11 Wall. 88, 20 L.Ed. 153.

in the act of 1793, and creates new offenses, and affixes to each a different punishment from that named in the old act, prescribing a fine not exceeding one thousand dollars, and imprisonment not exceeding six months upon indictment and conviction of the offender, and declaring that the offender shall also forfeit and pay, by way of civil damages, to the party injured, the sum of one thousand dollars for each fugitive lost, to be recovered by action of debt. The act of 1850 contained no clause repealing, in terms, the act of 1793, and the counsel of the government contended that it only added cumulative remedies, and was intended to give greater facilities to the master of the slave in securing the fugitive, and could not be construed to have a retrospective operation and wipe out liabilities incurred under the old act, and thus deprive the master of rights of action in suits pending, that had accrued to him; and that the court would not favor repeals by implication. But the court held unanimously, Mr. Justice Catron delivering the opinion, that the last act was plainly repugnant to the first, observing also that, as a general rule, it was 'not open to controversy, that when a new statute covers the whole subject of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, that the former law is repealed by implication, as the provisions of both cannot stand together.'

By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence."

Obviously, therefore, there is no real or basic difference between the effect of a repeal and an amendment, particularly where the repeal is a partial one; and the same problems arise in both cases. Where the repeal is partial, part of the original law remains. The same is equally true with the enactment of an amendment altering or improving the old law.

§ 306. Retroactive Construction.—Amendatory statutes are subject to the general principles discussed elsewhere herein⁴⁶ relative to retroactive operation.⁴⁷ Like original statutes, they will not be given retroactive construction, unless the language clearly makes such construction necessary.⁴⁸ In other words, the amendment will

⁴⁶ See Chapt. XXV, *supra*, § 277, et seq.

⁴⁷ *Erie County v Lowenstein*, 195 N.Y.S. 177, 202 Ap. Div. 579.

⁴⁸ *Warner v Walsh*, 27 Fed. (2) 952; *Mott Store Co. v St. Louis, etc., R. Co.*, 254 Mo. 654, 163 S.W. 929; *In re Frost's Will*, 192 Ap. Div. 206, 182 N.Y.S. 559; *Kelly v State*, 94 Ohio St. 331, 114 N.E. 255; *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883.

usually take effect only from the date of its enactment and will have no application to prior transactions, in the absence of an expressed intent or an intent clearly implied to the contrary.⁴⁹ Indeed, there is a presumption that an amendment shall operate prospectively.⁵⁰ But in accord with the rules applicable to original enactments and equally applicable to amendments or amendatory statutes, amendments relating to remedies or procedure may operate retroactively,⁵¹ provided, of course, vested rights and contractual obligations are not impaired or destroyed.⁵²

In this connection, it is interesting to note the language of Reynolds, C., in *Benton v Wickwire*,⁵³ wherein he speaks of the retroactive effect of an amendment:

“There was once, and long ago, a rule in the construction of statutes, that an amendment of it was to be regarded as if having been incorporated in and made a part of the original enactment, but that rule has been for a long time disregarded, and it is now settled that an amendment has no more retroactive effect than an original act upon the same subject. Ely

⁴⁹ *Riesen v Riesen*, 105 N.J. Eq. 144, 147 Atl. 225. But the portions of the original enactment not altered by an amendatory act remain effective from the date of their first enactment. *San Joaquin Irr. Co. v Stevinson*, 164 Calif. 221, 128 Pac. 924; *State v Dawson County*, 87 Mont. 122, 286 Pac. 125. This is true also when the new statute repeats provisions of the original act. *Mott Store Co. v St. Louis, etc., R. Co.*, 254 Mo. 654, 163 S.W. 929; *In re St. Michael's Church*, 76 N.J. Eq. 524, 74 Atl. 491; *Homnyack v Prudential Ins. Co.*, 194 N.Y. 456, 87 N.E. 769; *Dallman v Dallman*, 159 Wis. 480, 149 N.W. 137. Only the changes take effect prospectively. *Ford Motor Co. v State*, 59 N.D. 792, 231 N.W. 883.

⁵⁰ *American Surety Co. v Alamo Iron Works (Tex. Civ. Ap.)* 29 S.W. (2) 493, rev. on other grounds, 36 S.W. (2) 714. And see *State ex rel Nejdil v Bowman*, 199 Ind. 436, 156 N.E. 394, 157 N.E. 723, for a case involving time of taking effect of an amendment in futuro. Also note 37 Yale L.J. 127 (1927).

⁵¹ *Miceli v Morgano*, 36 Fed. (2) 507; *Maguire v Cunningham*, 64 Calif. Ap. 536, 222 Pac. 838; *Excelsior Mfg. Co. v Keyser*, 62 Miss. 155; *Abbott v State*, 117 Neb. 350, 220 N.W. 578; *Moore v Moore*, 208 N.Y. 97, 101 N.E. 711; and see *People v Clark*, 283 Ill. 221, 119 N.E. 329.

⁵² *Dunlap v U.S.*, 43 Fed. (2) 999; *Ex parte Sparks*, 120 Calif. 400, 52 Pac. 715. Also see *Frost v Los Angeles*, 181 Calif. 22, 183 Pac. 342; *Mott Store Co. v St. Louis, etc., R. Co.*, 254 Mo. 654, 163 S.W. 929.

⁵³ *Benton v Wickwire*, 54 N.Y. 226, 229.

v Holton, 15 N.Y. 595; People v Carnal, 6 N.Y. 463. Neither original statutes nor amendments can have any retroactive force unless in exceptional cases the legislature so declare."

This view seems correct regardless of whether the amendment is regarded as entirely displacing the old law and therefore as having the efficacy of an independent enactment, or whether the amendment is what the word signifies—an addition or alteration to the old law with some part of the old law remaining. Only for the purpose of ascertaining what the law is, should the amendment be considered a part of the original enactment.

CHAPTER XXVIII

CONSTRUCTION OF REPEALING ACTS

- § 307. In General.
- § 308. The Determination of Repeals by Implication, Generally.
- § 309. The Intent of the Legislature.
- § 310. The Presumption Against Implied Repeals.
- § 311. Inconsistency and Repugnancy.
- § 312. Identity of Subject and Object.
- § 313. Laws Passed at Same Session of the Legislature.
- § 314. Local or Special Laws.
- § 315. Miscellaneous Enactments Causing Implied Repeals.
- § 316. Effect of Repeal, Generally.
- § 317. Effect on Vested Rights.
- § 318. Effect on Remedies.
- § 319. Effect of Repeal of Repealing Act.
- § 320. Invalid Repealing Acts.
- § 321. Revival.
- § 322. Simultaneous Repeal and Re-enactment.
- § 323. Expiration, Suspension and Desuetude.

§ 307. **In General.**—We have already classified repeals as express and implied,¹ and defined each.² In this chapter, the various problems pertaining to the construction of repealing acts will be treated, not simply those which relate to the meaning of the language of the repealing act itself, but also those which pertain to the effect of the repealing act upon pre-existing law. And, as is obvious, certain of these problems have been discussed elsewhere in preceding and succeeding chapters, especially the chapters which deal with the prospective and retroactive operation of statutes,³ the construction of saving clauses and provisos,⁴ amendments,⁵ and codes and revisions.⁶ As is thus apparent, pre-existing laws may be repealed by the enactment of new and independent legislation,⁷ by amend-

¹ See § 133, *supra*.

² See §§ 134 and 137, *supra*.

³ See Chapter XXV, *supra*.

⁴ See Chapter XXVI, *supra*.

⁵ See Chapter XXVII, *supra*.

⁶ See Chapter XXIX, *infra*.

⁷ *Sanderson v Williams*, 142 Ark. 91, 218 S.W. 179; *Common. v Allen*, 240 Mass. 244, 133 N.E. 625; *State v Quinn*, 40 Mont. 472; *In re New York Institute*, 121 N.Y. 182, 8 N.E. 374.

ments,⁸ and by revision and codification.⁹ Since certain of these phases have been treated in considerable detail elsewhere, there is no need for repetition, except in so far as it is unavoidable.

In the construction of repealing acts, however, the general rules of interpretation which apply to statutes generally, are also applicable. For instance, the primary purpose of construction is to ascertain the legislative intent,¹⁰ and, in order to do so, the court may resort to the customary rules of construction discussed throughout this treatise. Consequently, the legislative intent must be derived from the language primarily.¹¹ An express repeal will operate to abrogate an existing law,¹² unless there is some indication to the contrary, such as a saving clause.¹³ Even existing rights and pending litigation may be affected, both civil¹⁴ and criminal,¹⁵ although it is not an uncommon practice to use the saving clause in order to preserve existing rights and to exempt pending litigation.¹⁶

Of course, most of the problems relating to the general subject matter of this chapter, arise from statutes which repeal pre-existing laws by implication. These problems are discussed at considerable length later on.¹⁷ Nevertheless, express repeals occasionally create problems almost as difficult as those created by implied repeals. For example, where a statute contains the common expression "all acts and parts of acts in conflict with the provisions of this act are hereby repealed," the question obviously arises as to the extent or scope of the repeal. It has been held that the use of the aforesaid

⁸ *People v Zito*, 237 Ill. 434, 86 N.E. 1041; *People v Lowell*, 250 Mich. 349, 230 N.W. 202.

⁹ *Rosasco v Tuolumne County*, 143 Calif. 430, 77 Pac. 148; *Murray v State*, 142 Ga. 7, 37 S.E. 111; *Poindexter v Pettis County*, 295 Mo. 629, 246 S.W. 38; *Garr v Fuls*, 286 Pa. 137, 133 Atl. 137.

¹⁰ *Matthews v Murchison*, 17 Fed. 760; *Attorney General v Duncan*, 76 N.H. 11, 78 Atl. 925; *Bennett v Bennett*, 116 N.Y. 584, 23 N.E. 17, 6 L.R.A. 553; *Evans Estate*, 30 Pa. Dist. 254; *Marshall v State*, 62 Tex. Cr. 177, 138 S.W. 759.

¹¹ *Mongeon v People*, 55 N.Y. 613. And note § 164, *supra*.

¹² See *supra*, § 93.

¹³ *Supra*, §§ 93 and 300.

¹⁴ *Butler v Palmer (N.Y.)* 1 Hill 324.

¹⁵ *Common. v Marshall (Mass.)* 11 Pick. 350; *Hartung v People*, 22 N.Y. 95.

¹⁶ *Jones v State*, 1 Iowa 395; *Common. v Marshall (Mass.)* 11 Pick. 350.

¹⁷ See § 308, *et seq.*, *infra*.

expression indicates that there may be acts on the same subject which are not thereby repealed.¹⁸ Similarly, where a provision contained in a codification expressly repealed all former acts "within the purview" of the new code, only those cases covered by the body of the repealing act will be affected, so that no provision of any existing law in relation to cases not provided for by the later act, will be repealed.¹⁹ Moreover, where a repealing clause expressly refers to a portion of a prior act, the remainder of such act will not usually be repealed, as a presumption is raised that no further repeal is necessary, unless there is irreconcilable inconsistency between them.²⁰ In like manner, if the repealing clause is by its terms confined to a particular act, quoted by title, it will not be extended to an act upon a different subject.²¹ And a general act repealing all acts inconsistent therewith, will usually apply only to general acts and not to special or local laws.²² The reason behind this rule finds its foundation in two premises; the special act is not repealed because it is not named,²³ or because there is no absolute inconsistency between the general act and the special act.²⁴ Consequently, if the repealing act named the special act,²⁵ or if the two were irreconcilably inconsistent,²⁶ the special act would also be terminated.

As one can infer from the foregoing discussion, the problems created by implied repeals are also created by acts which expressly repeal prior laws.²⁷ Although the problems are not so numerous nor perhaps so difficult in those cases where the express repeal

¹⁸ *Hess v Reynolds*, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927. Also see *Madison v So. Wisconsin R. Co.*, 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910. That the clause adds nothing to the act, see *State ex rel Charette v Dist. Court (Mont.)* 86 Pac. (2) 750.

¹⁹ *Clark v State*, 171 Ind. 104, 84 N.E. 984.

²⁰ See Note in *Am. State Rep.*, 273.

²¹ *Schultz v Schultz (Va.)* 10 Grat. 358.

²² *State v Miller*, 30 N.J.L. 368; *State v South Kingstown*, 18 R.I. 258, 27 Atl. 599, 22 L.R.A. 65. Also see *St. Louis, etc., R. Co. v Grayson*, 72 Ark. 119, 78 S.W. 777; *State v Fiala*, 47 Mo. 310; *Casterton v Vienna*, 163 N.Y. 368, 57 N.E. 622.

²³ *Common. v Scheckler*, 1 Pa. Co. 505.

²⁴ *Jones v Oldham*, 109 Ark. 24, 158 S.W. 1075.

²⁵ *Brunswick v Williamson*, 44 N.J.L. 165, aff. 46 N.J.L. 204, aff. 130 U.S. 189, 32 L.Ed. 915, 9 S.Ct. 453.

²⁶ *Jones v Oldham*, 109 Ark. 24, 158 S.W. 1075.

²⁷ See § 135, *supra*.

points out in rather specific terms those statutes which it intends to abrogate, they do frequently arise. But the vast majority of the problems due to repeals by implications, so far as express repealing acts are concerned, grow out of the use of the expression found in so many legislative enactments that "all laws and parts of laws in conflict herewith are expressly repealed."²⁸ As we have previously pointed out, there is considerable justification for regarding a repeal caused by such a statutory provision as a repeal by implication.²⁹ Provisions of this character leave the question open as to what laws are inconsistent.³⁰ This is equally true, even where inconsistent statutes are enacted.³¹ In either case, whether the repealing act contains a provision that all inconsistent acts are repealed or not, all pre-existing inconsistent acts are necessarily abrogated.³² As a result, the rules of law which apply to implied repeals generally will be applicable to repeals caused by the use of the expression "all acts or parts of acts inconsistent herewith" or expressions of similar import.

§ 308. The Determination of Repeals by Implication, Generally.

—Of course, where a repeal is effected through implication, the later enactment thus affecting preexisting law must be subjected to close scrutiny in the light of its own provisions and those of the law apparently abrogated in whole or in part. The construction of the new law becomes an important consideration, since its meaning and scope will determine whether a repeal takes place, and if so, its extent. And usually one of two questions will arise: (1) whether the new law is intended as a substitute for the old; or (2) whether the new is irreconcilably inconsistent with the old, so that the former is thereby terminated.³³ In brief, the problem will be simply to determine what is the legislative intention³⁴—whether the old law shall cease or whether it shall be supplemented.

²⁸ See such typical cases as *State v Schaumburg*, 149 La. 470, 89 So. 536; *Drew v Munford*, 114 Neb. 100, 206 N.W. 159; *Greer v Bird*, 93 Okla. 221, 220 Pac. 579; *Newbold v Pennock*, 154 Pa. 591, 26 Atl. 606.

²⁹ See § 135, *supra*.

³⁰ *Bank of N.Y. v Tilton*, 82 N.H. 81, 129 Atl. 492; *Common. v Pottsville*, 246 Pa. 468, 92 Atl. 639.

³¹ See § 311, *infra*.

³² See § 309, *infra*.

³³ See § 137, *supra*.

³⁴ See § 309, *infra*.

§ 309. **The Intent of the Legislature.**—Whether a statute, either in its entirety or in part,³⁵ has been repealed by implication, as already stated, depends upon the intent of the legislature.³⁶ It is the province of the court to ascertain this intent,³⁷ from the terms and provisions of the later enactment.³⁸ But the courts will not recognize an implied repeal, unless the intent to repeal clearly appears.³⁹ It must be free from any reasonable doubt.⁴⁰ And the courts will seek to avoid a repeal by implication by resorting to any reasonable construction⁴¹ or hypothesis.⁴² If by any fair interpre-

³⁵ For cases involving partial repeal, see § 133, note 10, *supra*.

³⁶ *Continental Ins. Co. v Simpson*, 8 Fed. (2) 439; *Jefferson County v Hewitt*, 206 Ala. 405, 90 So. 781; *Brockman v Board of Directors (Ark.)*, 66 S.W. (2) 619; *State v Peverly*, 32 Dela. 443, 125 Atl. 421; *Monical v Neise*, 49 Ind. Ap. 302, 94 N.E. 232; *Dougherty v Joyce*, 233 Mich. 619, 207 N.W. 863; *Gould v Bennett*, 276 N.Y.S. 113; *Haley v State*, 156 Tenn. 85, 299 S.W. 799; *Nelden v Clark*, 20 Utah 382, 59 Pac. 524.

³⁷ *State v Peterson*, 52 N.D. 120, 201 N.W. 856; *Huston v Scott*, 20 Okla. 142, 94 Pac. 512. An express repeal may be some evidence against a repeal by implication. *U.S. v Shaw*, 39 Fed. 433, 47 L.R.A. 232. Nor will there be a repeal by implication where a saving clause is affixed to an amendatory act. *Merchants Trans. Co. v Gates*, 180 Ark. 96, 21 S.W. (2) 406; *Newbauer v State*, 200 Ind. 118, 161 N.E. 826. And where two statutes are passed at the same session of the legislature, there is strong indication that neither are to be repealed by implication. *Common. v Huntley*, 156 Mass. 236, 30 N.E. 1127, 15 L.R.A. 839.

³⁸ *State v Coleman*, 117 La. 973, 42 So. 471; *State v Superior Court*, 60 Wash. 370, 111 Pac. 233.

³⁹ *U.S. Light Corp. v Niagara Falls Gas Co.*, 23 Fed. (2) 719; *In re Mitchell*, 120 Calif. 384, 52 Pac. 799; *Harrington v Harrington*, 58 Colo. 154, 144 Pac. 20; *Middleton v State*, 74 Fla. 234, 76 So. 785; *Galpin v Chicago*, 159 Ill. Ap. 135, *aff'd* 249 Ill. 554, 94 N.E. 961; *Lewis v Mosely*, 215 Ky. 573, 286 S.W. 793; *Dougherty v Joyce*, 233 Mich. 619, 207 N.W. 863; *State v Buder*, 315 Mo. 791, 287 S.W. 307; *Schafer v Schafer*, 71 Neb. 708, 99 N.W. 482; *York Sav. Bank v Grace*, 103 N.Y. 313, 7 N.E. 164; *State v Perkins*, 141 N.C. 797, 53 S.E. 735; *Rodebaugh v Phila. Traction Co.*, 190 Pa. 358, 42 Atl. 953; *Ward v Smith*, 166 Wis. 342, 165 N.W. 299.

⁴⁰ *Stevens ex rel Kuberski v Haussermann*, 113 N.J.L. 162, 172 Atl. 738.

⁴¹ *Stevens v Biddle*, 298 Fed. 209; *Rowland v McBride*, 35 Ariz. 511, 284 Pac. 270; *Inyo County v Hess*, 53 Calif. Ap. 415, 200 Pac. 373; *State v Martinez*, 43 Idaho 180, 250 Pac. 239; *Wood v Common.*, 229 Ky. 452, 17 S.W. (2) 440; *People v Thompson*, 161 Mich. 391, 126 N.W. 466; *State v Davisson*, 28 N.M. 653, 217 Pac. 240; *Matter of Tiffany*, 179 N.Y. 455, 72 N.E. 512; *Lovejoy v State*, 18 Okla. Cr. 335, 194 Pac. 1087.

⁴² *McDonald v Wasson (Ark.)*, 67 S.W. (2) 722; *Chicago v Chicago R. Co.*, 261 Ill. 478, 104 N.E. 240. Also see *Michigan Tel. Co. v Benton Harbor*, 121 Mich. 512, 80 N.E. 386, 47 L.R.A. 232.

tation all sections of a statute can stand together, there will be no implied repeal.⁴³

§ 310. The Presumption Against Implied Repeal.—As is thus apparent, the courts do not look with favor upon implied repeals,⁴⁴ and the presumption is always against the intention of the legislature to repeal legislation by implication.⁴⁵ The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption,⁴⁶ which is accentuated where the various statutes were enacted at the same session of the legislature.⁴⁷ Con-

⁴³ *State ex rel Karbe v Buder* (Mo.) 78 S.W. (2) 835.

⁴⁴ *U.S. v Noce*, 268 U.S. 613, 69 L.Ed. 116, 45 S.Ct. 610; *In re Martin*, 75 Fed. (2) 618; *State v Smiley*, 219 Ala. 119, 121 So. 398; *Connelly v Lawhon*, 180 Ark. 964, 23 S.W. (2) 990; *People v Martin* (Calif.) 205 Pac. 121, 21 A.L.R. 1399; *People v Chaffee County*, 86 Colo. 249, 281 Pac. 117; *State v Hatch*, 82 Conn. 122, 72 Atl. 575; *Nolan v Moore*, 81 Fla. 594, 88 So. 601; *Griggs v Macon*, 154 Ga. 519, 114 S.E. 899; *Kizer v Mattoon*, 332 Ill. 545, 164 N.E. 20; *Straus Bros. Co. v Fisher*, 200 Ind. 307, 163 N.E. 225; *Ogilvie v Des Moines* (Iowa) 233 N.E. 526; *Voran v Wright*, 129 Kan. 1, 281 Pac. 938, *aff'd* 129 Kan. 601, 284 Pac. 807; *Wood v Common.*, 229 Ky. 452, 17 S.W. (2) 440; *State v Walker* (Mo.) 34 S.W. (2) 124; *Liske v State*, 119 Neb. 640, 230 N.W. 503; *State v Scott*, 52 Nev. 232, 286 Pac. 119; *State v Hollenbacher*, 101 Ohio St. 478, 129 N.E. 702; *Roxana Petro. Corp. v Cope*, 132 Okla. 152, 269 Pac. 1084, 60 A.L.R. 837; *State v Slusher*, 119 Ore. 141, 248 Pac. 358; *Snyder's Appeal*, 302 Pa. 259, 153 Atl. 436; *Fonville v Gregory*, 162 Tenn. 294, 36 S.W. (2) 900; *Miller v State Entomologist*, 146 Va. 175, 135 S.E. 813, 67 A.L.R. 197, *aff'd* 276 U.S. 272, 72 L.Ed. 568, 48 S.Ct. 246; *State v King County* (Wash.) 297 Pac. 774; *Vinson v Wayne County Ct.*, 94 W.Va. 591, 119 S.E. 808.

⁴⁵ *Bookbinder v U.S.*, 287 Fed. 790; *Gilliland Oil Co. v State*, 171 Ark. 415, 285 S.W. 16; *Chilson v Jerome*, 102 Calif. Ap. 635, 283 Pac. 862; *State v Simpson*, 94 Fla. 789, 114 So. 542; *Martin v Greenville*, 224 Ky. 730, 6 S.W. (2) 1114; *State v Lee*, 319 Mo. 976, 5 S.W. (2) 83; *Ross v Graham*, 203 N.Y.S. 390, 122 Misc. 574; *Story v Alamance County*, 184 N.C. 336, 114 S.E. 493; *Garr v Fuls*, 286 Pa. 137, 133 Atl. 150; *Berry v State*, 69 Tex. Cr. 602, 156 S.W. 626.

⁴⁶ *Town of Brownsburg v Trucksess* (Ind. Ap.) 185 N.E. 315; *Gould v Bennett*, 276 N.Y.S. 113.

⁴⁷ *In re Opinions of the Justices*, 231 Ala. 152, 164 So. 572. Also see *State ex rel Normile v Cooney* (Mont.) 47 Pac. (2) 637; *Pullen v Morgenthau*, 73 Fed. (2) 281; *State ex rel Board of Com'rs v Board of Com'rs*, 170 Ind. 595, 85 N.E. 513. And note *Lambert v Board of Trustees*, 151 Ky. 725, 152 S.W. 802. The same is true with revisions. *Saslow v Previti* (N.J.) 3 Atl. (2) 811.

sequently, as we have already indicated, the intent to repeal must clearly appear,⁴⁸ and such a repeal will be avoided if at all possible.⁴⁹

This presumption against the intent to repeal by implication rests upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject,⁵⁰ so that the failure to add a repealing clause indicates that the intent was not to repeal any existing legislation.⁵¹ This presumption, however, is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing law.⁵² Similarly, when a statute specifically repeals certain acts or parts of an act, it will not be presumed that the legislature intended to repeal any act or any part of an act not mentioned.⁵³

§ 311. Inconsistency and Repugnancy.—The inconsistency or repugnancy between two statutes necessary to supplant or repeal the earlier one, must be more than a mere difference in their terms and provisions. There must be what is often called “such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made stand together.”⁵⁴ In other words, they must be absolutely repugnant,⁵⁵ or irreconcili-

⁴⁸ See § 309, *supra*.

⁴⁹ *Lewis v U.S.*, 244 U.S. 132, 61 L.Ed. 1039, 37 S.Ct. 570; *Ex parte Sohneke*, 148 Calif. 262, 82 Pac. 956; *Chicago, etc., R. Co. v Doyle*, 258 Ill. 624, 102 N.E. 260; *State v Iowa Tel. Co.*, 175 Iowa 607, 154 N.W. 678; *Common. v Huntley*, 156 Mass. 236, 30 N.E. 1127, 15 L.R.A. 839; *State v Perkins*, 141 N.C. 797, 53 S.E. 735; *Huston v Scott*, 20 Okla. 142, 94 Pac. 512; *Ex parte Morgan*, 57 Tex. Cr. 551, 124 S.W. 99; *Morrison v Eau Claire*, 115 Wis. 538, 92 N.W. 280. Also see Note, 4 L.R.A. 309.

⁵⁰ *Continental Ins. Co. v Simpson*, 8 Fed. (2) 439; *Dougherty v Joyce*, 233 Mich. 619, 207 N.W. 863; *Oakland v Conservation Board*, 98 N.J.L. 99, 118 Atl. 787; *State v Poindexter*, 49 N.D. 201, 190 N.W. 818; *Webber v Bailey (Ore.)* 51 Pac. (2) 832.

⁵¹ See cases under note 45, *supra*.

⁵² *Wilson v U.S. (U.S.)* 77 Ct. Cl. 630.

⁵³ *Town of Dry Grove v Otto*, 266 Ill. Ap. 234.

⁵⁴ *U.S. v Greathouse*, 166 U.S. 601, 41 L.Ed. 1130, 17 S.Ct. 701; *In re Phoenix Hotel Co.*, 13 Fed. Supp. 229; *Wolff v Rife*, 140 Kan. 584, 38 Pac. (2) 102; *State v Walbridge*, 119 Mo. 383, 24 S.W. 457; *Beha v State*, 67 Neb. 27, 93 N.W. 155; *Carter v Whitcomb*, 74 N.H. 482, 69 Atl. 779; *In re Enlargement of School Dist.*, 155 Minn. 41, 192 N.W. 345.

⁵⁵ *Hahn v Clayton County (Iowa)* 255 N.W. 695.

able.⁵⁶ Otherwise, there can be no implied repeal, as we have pointed out in the preceding section, for the intent of the legislature to repeal the old enactment is utterly lacking.⁵⁷ Since there is a presumption against an implied repeal,⁵⁸ and since the court will seek to avoid such a repeal by any fair and reasonable construction,⁵⁹ the inconsistency must be clear,⁶⁰ manifest,⁶¹ and irreconcilable.⁶²

But the repugnancy or inconsistency need not be between every provision of the two acts, as implied repeals may operate on parts of a statute as well as on it in its entirety.⁶³ Where this is true, the old statute will be repealed by implication only to the extent of the repugnancy.⁶⁴

⁵⁶ Bugbee v Mills, 116 N.J. Eq. 59, 172 Atl. 203.

⁵⁷ See § 310, note 52, supra.

⁵⁸ See § 310, supra.

⁵⁹ Seward County v Aetna L. Ins. Co., 90 Fed. 222; Ferguson v Jackson County Com'rs, 187 Ala. 645, 65 So. 1028; Conner v Southern Express Co., 37 Ga. 397; Eckerson v Des Moines, 137 Iowa 452, 115 N.W. 177; State v Holcomb, 93 Kan. 424, 144 Pac. 266; Lake v Cedar Springs, 162 Mich. 569, 127 N.W. 690; State v Archibald, 43 Minn. 328, 45 N.W. 606; Gasconade County v Gordon, 241 Mo. 569, 145 S.W. 1160; People v Crissey, 91 N.Y. 616; Brunswick County v Woodside, 31 N.C. 496; In re Hesse, 93 Ohio St. 230, 112 N.E. 511; Somers v Common., 97 Va. 759, 33 S.E. 381; State v Arnold, 151 Wis. 19, 138 N.W. 78. Also see § 139, supra.

⁶⁰ Summers v Atchinson, etc., R. Co., 2 Fed. (2) 717; Chilson v Jerome, 102 Calif. Ap. 635, 283 Pac. 862; Sims v State, 7 Ga. Ap. 852, 68 S.E. 493; Kizer v City of Mattoon, 332 Ill. 545, 164 N.E. 20; Wrightman v Gideon, 296 Mo. 214, 247 S.W. 135; People v Harris, 123 N.Y. 70, 25 N.E. 317; Waters v Buncombe County Comrs., 186 N.C. 719, 120 S.E. 450; Gilbert v Lebanon Valley St. Ry. Co., 300 Pa. 384, 150 Atl. 638.

⁶¹ Wood v U.S. (U.S.) 16 Pet. 342, 10 L.Ed. 987; McKenna v Edmundstone, 91 N.Y. 231.

⁶² U.S. v Tiger, 19 Fed. (2) 35; Owens v Smith, 200 Iowa 261, 204 N.W. 439.

⁶³ City of Bisbee v Cochise County (Ariz.) 36 Pac. (2) 559.

⁶⁴ Bookbinder v U.S., 287 Fed. 790; Houck v State, 166 Ark. 613, 267 S.W. 127; Cook v Meyer, 73 Ala. 580; Ex parte Cannon, 167 Calif. Ap. 142, 138 Pac. 740; New York Central R. Co. v Stevenson, 277 Ill. 474, 115 N.E. 633; Kramer v Beebe, 186 Ind. 349, 115 N.E. 83; Barnett v Caldwell, 231 Ky. 514, 21 S.W. (2) 838; Leavenworth v Reilly, 97 Kan. 827; Baird v N.Y., 96 N.Y. 567; Carr v Little, 188 N.C. 100, 123 S.E. 625; In re Lambrecht, 137 Mich. 450, 100 N.W. 606; State v Taylor, 323 Mo. 15, 18 S.W. (2) 474; Common. v Crowl, 245 Pa. 554, 91 Atl. 922; Beck v Cox, 77 W.Va. 442, 87 S.E. 492; State v Milwaukee Elec. R. Co., 144 Wis. 386, 129 N.W. 623.

Nevertheless, it is possible that the court will be unable to ascertain which of two inconsistent laws shall prevail. If so, the rule applicable has been announced in *Maddux v City of Nashville* (158 Tenn. 307, 13 S.W. (2) 319):

"It being conceded that the two acts are contradictory and irreconcilable, and being unable to determine that either became effective, in point of time, before the other, it results that both are invalid."

Of course, the reason for the rule that an implied repeal will take place in the event of clear inconsistency or repugnancy, is obvious. This reason is pointed out in *Crosby v Patch* (18 Calif. 438):

"As laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. *Bowen v Lease*, 5 Hill 226. It is a rule, says Sedgwick, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. 'The reason and philosophy of the rule,' says the author, 'is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'"

Can a test be provided by which irreconcilable inconsistency or repugnancy can be easily ascertained? It has been suggested above that such a condition exists when the two statutes cannot stand together. Such a test seems generally sufficient where the pre-existing statute is repealed in its entirety. But where a partial repeal occurs, a different test must be applied. Is not a workable one announced in *People v McNulty* (9 N.Y.S. (2) 380)?

"The determining consideration must be whether on comparison of the subject matter of the two statutes, the one is fairly to be regarded as a revision of the other."

If the later enactment seems clearly intended to supplant the former law, to that extent, even though the old law, in its entirety, is supplanted, irreconcilable inconsistency or repugnancy must exist. Naturally, therefore, the subject matter of the two enactments is an indispensable consideration.

§ 312. **Identity of Subject and Object.**—Merely because a later enactment may relate to the same subject matter as that of an earlier statute, is not of itself sufficient to cause an implied repeal of the latter,⁶⁵ since the new law may be cumulative.⁶⁶ An implied repeal will not take place under these circumstances, unless the two statutes are inconsistent and irreconcilable,⁶⁷ or unless the new statute is clearly intended as a complete substitute for the old one.⁶⁸ The court will endeavor to give both effect, if possible.⁶⁹ In other words, there must be some expression of the legislative intent to repeal the existing statute.⁷⁰ The two statutes must relate to the same subject matter and have the same purpose.⁷¹ And, as we have already suggested,⁷² it is essential that the new

⁶⁵ *Cleveland v Palin* (Ind.) 199 N.E. 142; *Kerner v United Medical Service*, 362 Ill. 442, 200 N.E. 157. And see *Mobile v Marx*, 75 Fed. (2) 569 that a general law will not be construed as repealing a special law dealing with the same subject.

⁶⁶ *Smith v Sullivan*, 190 Ark. 859, 81 S.W. (2) 922; *State ex rel Trimble v Kantas*, 190 Ark. 1092, 82 S.W. (2) 847.

⁶⁷ *Frost v Wenie*, 157 U.S. 46, 39 L.Ed. 614, 15 S.Ct. 532; *Fowler v Pirkins*, 77 Ill. 271; *Diver v Keokuk Sav. Bank*, 126 Iowa 691, 102 N.W. 542; *State Sanatorium v State Treasurer*, 173 N.C. 810, 92 S.E. 689; *Messick v Duby*, 86 Ore. 366, 168 Pac. 628; *State Univ. v Richards*, 20 Utah 457, 59 Pac. 96.

⁶⁸ *Posadas v National Bank*, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351; *City of Fairfield v Pappas*, 362 Ill. 80, 199 N.E. 292; *Gilbert v Craddock*, 67 Kan. 346, 72 Pac. 869; *Exall v Holland*, 166 Ky. 315, 179 S.W. 241; *Harris' Case*, 124 Me. 68, 126 Atl. 166; *Heppenstall v Baudouine*, 132 N.Y.S. 511, 73 Misc. 118; *State Sanatorium v State Treasurer*, 173 N.C. 810, 92 S.E. 689. Accordingly, where a statute fixes the annual salary of an official and a subsequent statute appropriates a less sum for such salary, the former law is not repealed. *U.S. v Langston*, 118 U.S. 389.

⁶⁹ *Cleveland v Palin* (Ind.) 199 N.E. 142; *Ellis v Holcombe* (Tex.) 69 S.W. (2) 449. Through the application of this rule, the later statute was held merely to extend the scope of the crime of arson. *Common. v Bloomberg* (Mass.) 19 N.E. (2) 62.

⁷⁰ *U.S. v Claflin*, 97 U.S. 546, 24 L.Ed. 1082; *Sykes v People*, 127 Ill. 117, 19 N.E. 705, 2 L.R.A. 461; *Barber v St. Louis, etc., R. Co.*, 43 Iowa 223; *State v Coleman*, 117 La. 973, 42 So. 471; *Homer v Common.*, 106 Pa. St. 221; *Mesher v Osborne*, 75 Wash. 439, 134 Pac. 1092. Also see *Madison v Wisconsin R. Co.*, 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910.

⁷¹ *Brandon v Askew*, 172 Ala. 160, 54 So. 605; *Niceley v Madera County* (Calif. Ap.) 296 Pac. 306; *City of Monroe v Ouachita Parish School Dist.* (La.) 135 So. 657.

⁷² See note 66, *supra*.

statute cover the entire subject matter of the old;⁷³ otherwise there is no indication of the intent of the legislature to abrogate the old law. Consequently, the later enactment will be construed as a continuation of the old one.⁷⁴ Moreover, the foregoing is equally true where statutes dealing with the same subject matter are passed at the same time.⁷⁵

The court in *American Bakeries Company v Haines City* (Fla.) (180 So. 524) has succinctly stated the law relating to implied repeals so far as subject matter is concerned:

“An intent to repeal prior statutes or portions thereof may be made apparent, where there is a positive and irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes. But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute.

“If two statutes may operate upon the same subject without positive inconsistency or repugnancy in the practical effect and consequences, they should each be given the effect designed for them, unless a contrary intent clearly appears.”

An illustration of this principle will be found in *United States v Bruno* (25 Fed. Supp. 793), where a statute penalizing the false procurement of naturalization was held not impliedly repealed by a statute penalizing false swearing in naturalization proceedings, since there was nothing inconsistent between the two statutes.

The question, at this juncture, might be asked: what is the reason for the rule now under discussion? An answer has been given in a relatively recent case—*Meek v Wheeler County* (— Tex. —, 125 S.W. (2) 331):

“It undoubtedly is true that a construction which repeals former statutes, by implication, is not to be favored; and it is also true that statutes in *pari materia* and relating to the same

⁷³ *Stevens v Biddle*, 298 Fed. 209; *Bell v Talbott*, 252 Ky. 721, 68 S.W. (2) 36; *State v Wilson*, 43 N.H. 415; *Huston v Scott*, 20 Okla. 142, 94 Pac. 512; *Iola State Bank v Moseley* (Tex.) 259 S.W. 227. And note *People v Fitzgerald* (Calif.) 58 Pac. (2) 718, cert. den., 57 S.Ct. 115, that where the later statute does not cover the entire field of an earlier one, and fails to embrace a material part of such earlier statute, the later statute will not repeal so much of the earlier as is not included within its scope.

⁷⁴ *Posadas v National Bank*, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351.

⁷⁵ *Millhaubt v McKee*, 141 Kan. 181, 40 Pac. (2) 363. Also see § 313, *infra*.

subject, are to be taken and construed together; because it is to be inferred that they had one object in view, and were intended to be considered as constituting one entire and harmonious system. But when the new statute, in itself, comprehends the entire subject and creates a new, entire, and independent system, respecting that subject matter, it is universally held to repeal and supersede all previous systems and laws respecting the same subject matter."

Obviously, two inconsistent statutes pertaining to the same subject matter, if both were allowed to stand, would create an intolerable situation. Our law would not be a harmonious system. In fact, it would be utterly impossible to know what the law was, if two repugnant statutes were regarded of equal force. The doctrine of implied repeals is an indispensable instrumentality by which our legal system is maintained as a harmonious whole.

§ 313. Laws Passed at Same Session of Legislature.—It sometimes happens that the legislature at the same session will enact two laws which are irreconcilable.⁷⁶ Where this happens, the one which is the latest expression of the legislative will should prevail;⁷⁷ the other will be repealed by implication.⁷⁸ Nevertheless, if publication is required to make a statute effective, where two inconsistent statutes are passed at the same session, the one first

⁷⁶ *Lambert v Board of Trustees*, 151 Ky. 725, 152 S.W. 802.

⁷⁷ *People v Kramer*, 328 Ill. 512, 160 N.E. 60; *State v Davis*, 70 Md. 237, 16 Atl. 529; *State ex rel Monier v Crawford*, 303 Mo. 652, 262 S.W. 341; *Lacey v Palmer*, 93 Va. 159, 24 S.E. 930. It has been held that the chapter numbers are determinative. *Metropolitan Board of Health v Schmades* (N.Y.) 3 Daly 282. Even the time of the governor's approval has been held the decisive factor. "The general rule is conceded to be that where two statutes contain repugnant provisions, the one last signed by the governor is a repeal of one previously signed. But this is so merely because it is presumed to be so intended by the law-making power. Where the intention is otherwise, and that intention is manifest from the fact of either enactment, the plain meaning of the legislative power, thus manifested, is the paramount rule of construction. It is no part of the duty of the judiciary to resort to technical subtleties to defeat the obvious purposes of the legislative power in a matter over which that power has a constitutional right to control." *Southwark Bank v Common.*, 26 Pa. 446. "... where two acts relating to the same subject are passed at the same session of the legislature, there is a strong presumption against repeal." *State ex rel Charette v Dist. Ct. (Mont.)* 86 Pac. (2) 750.

⁷⁸ *Ibid.*

published will supersede the other.⁷⁹ And, if only one of two inconsistent acts enacted at the same session contains an emergency clause, there is a presumption, at least, that the legislature intended the one which contained the emergency clause to prevail.⁸⁰

§ 314. Local or Special Laws.—Even though the inference of an intent to repeal because of subsequent repugnant or inconsistent legislation is greatly diminished when a prior local law and a subsequent general law are involved,⁸¹ such an inference may nevertheless arise.⁸² The legislative intention, of course, is here, too, the determining factor.⁸³

As a general rule, however, the local or special law will not be repealed.⁸⁴ Indeed, there is a presumption to this effect.⁸⁵ Nevertheless, this presumption may be overcome by irreconcilable inconsistency⁸⁶ between the prior special act and the subsequent general law.⁸⁷ It may also be overcome where the general law covers the entire subject matter of the special act,⁸⁸ or where there is some other clear indication of the legislative intent to repeal the local

⁷⁹ *Thomas v Collins*, 58 Mich. 64, 24 N.W. 553.

⁸⁰ *Campbell County Elec. Comm. v Weber*, 240 Ky. 373, 42 S.W. (2) 511. Also see *State ex rel. Scofield v Easterday* (Wash.) 46 Pac. (2) 1052.

⁸¹ *State v Peter*, 101 Minn. 462, 112 N.W. 866.

⁸² *Derrisaw v Schaffer*, 7 Fed. Supp. 876; *People v Chicago etc. R. Co.*, 300 Ill. 218, 133 N.E. 308; *State ex rel. McDowell, Inc. v Smith* (Mo.) 67 S.W. (2) 50; *Schott v Continental Auto Ins. Co. (Mo.)* 31 S.W. (2) 7.

⁸³ *Schott v Continental Auto Ins. Co. (Mo.)* 31 S.W. (2) 7; *People v Kaye*, 146 N.Y.S. 398.

⁸⁴ *U.S. ex rel. Gillett v Dern*, 74 Fed. (2) 485; *U.S. v Newton*, 36 Fed. (2) 428; *State ex rel. Hyde v Buder*, 315 Mo. 791, 287 S.W. 307; *Coxe v State*, 144 N.Y. 396, 39 N.E. 400; *Common. v Reese*, 293 Pa. 398, 143 Atl. 127; *State v Public Land Comrs.*, 106 Wis. 584, 82 N.W. 549.

⁸⁵ *Renner v State*, 182 Ind. 394, 106 N.E. 703; *Kucher v Weaver*, 23 Okla. 420, 100 Pac. 915; *State v Clausen*, 51 Wash. 548, 99 Pac. 743, 51 Wash. 689, 101 Pac. 835. Also see *Sneeden v City of Marion, Ill.*, 64 Fed. (2) 721, rev. 58 Fed. (2) 341.

⁸⁶ For treatment of such inconsistency, generally, see § 140, *supra*.

⁸⁷ *Massey v State*, 168 Ark. 174, 273 S.W. 711; *People v Nelson*, 156 Ill. 364, 40 N.E. 957; *State ex rel. Monier v Crawford*, 303 Mo. 652, 262 S.W. 341; *O'Malley v Prudential Cas. Co. (Mo.)* 80 S.W. (2) 896; *Cone v Lauer*, 158 N.Y. 175, 52 N.E. 1113.

⁸⁸ *Ex parte James*, 4 Okla. Co. 94, 111 Pac. 947; *State v Hewitt*, 74 Wash. 573, 134 Pac. 474.

law.⁸⁹ And, on the other hand, an implied repeal of a general law by a subsequent private act is not to be favored and will not take place, unless there is also such a clear repugnancy between the two that they cannot be reconciled and made to operate concurrently.⁹⁰

In general, the proper judicial attitude has been expressed by one court in the following language:

"In the construction of general and special acts, the maxim 'generalalia specialiabilis non derogant' applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the general act is a general revision of the whole subject, or unless the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other.

"Where one statute in comprehensive terms covers a subject, and another later statute embraces only a particular part of the same subject, the two should be construed together, unless a different legislative intent appears; and the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any."⁹¹

Additional light will be shed upon the repeal of special laws by general laws, if a few cases are examined. *Starbird v Brown*,^{91a} may be selected as one which provides us with a succinct analysis of the general problem:

"The question, therefore, is whether the later general or the earlier private act governs the decision of the case. Is or not the special act amended by the general act so as to become conformable thereto? We think it is.

⁸⁹ *Howard v Hulbert*, 63 Kan. 793, 66 Pac. 1041; *City of Bogalusa v Gullotta*, 181 La. 159, 159 So. 309; *State v Fialia*, 47 Mo. 310; *Common. v Brown*, 210 Pa. 29, 59 Atl. 479.

⁹⁰ *Arsenal School Dist. v Consolidated Town*, 120 Conn. 348, 180 Atl. 511.

⁹¹ *American Bakeries Co. v Haines City (Fla.)* 180 So. 525.

^{91a} *Starbird v Brown*, 84 Me. 238. Also see *City of Hartford v Hartford Theological Seminary*, 66 Conn. 475, 34 Atl. 483; *Common. v MacFerron*, 152 Pa. 244, 25 Atl. 556. For other cases where general laws repeal special laws on the same subject matter, see *Birmingham v Southern Express Co.*, 164 Ala. 529, 51 So. 159; *Fosdick v Mayor*, 14 Ohio St. 472; *Rodgers v U.S.*, 185 U.S. 83, 22 S.Ct. 582, 46 L.Ed. 816; *Simon v Simon*, 26 Fed. (2) 530. But notice *Graham v Philadelphia*, 288 Pa. 152, 135 Atl. 908, that a subsequent affirmative general statute does not by implication repeal an earlier special law on the same subject in every instance.

"It is not always easy to decide questions of this kind, and for that reason cases are to be found near to the dividing line on either side of it. But the precedents are numerous in support of a general rule which is applicable when it is claimed that one statute effects the repeal of another by necessary implication.

"The test is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old law be each efficacious in its own sphere? *Brown v City of Lowell*, 8 Mete. (Mass.) 172."

As a result of this rule, the court in *State v Mangiaracina* (— Mo. —, 125 S.W. (2) 58) held that the larceny of an automobile was not included in the general larceny statute, and in this language both stated the rule of law applicable and the reason behind the rule:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special is later, it will be regarded as an exception to, or qualification of, the prior general one."

State ex rel Gates v Commissioners of Public Lands (106 Wis. 584, 82 N.W. 549) will serve to illustrate the application of the rule where there is an absence of repugnancy:

"Did the continuation in the statutes of 1898, of Section 205, Rev. St. 1878, in connection with the repealing clause of the new statutes—repealing 'all acts and parts of acts the subjects whereof are hereby revised and re-enacted or which are repugnant to its provisions,'—displace the special law of 1897 regulating the sale of state lands therein mentioned?

"The rule is that a general law, or the mere re-enactment of a general law, will not repeal a special act by implication. . . . Also that a mere re-enactment of a statute continues it without change as regards special laws within its general scope . . .

"So there can be no question but that the special law of 1897, governing the sale of swamp lands within the territory there designated, was unaffected by the mere carrying forward and continuation of the general law relating to the sale of such lands, which existed when such special law was enacted, into

the revision of 1898; and the proposition under discussion must be resolved in the negative, unless the general repealing clause of the new statutes changes the situation. On that subject the law must be considered as settled by the decisions of this court . . . the general repealing clause of the revision only referred to general statutes, not to statutes regarding particular matters within their general scope.

"The whole scheme of the revision repels the idea that it was the legislative intent, by the mere continuation of the general provision of the old statute as to the sale of swamp lands, and the repeal of all acts and parts of acts inconsistent therewith, that it should displace a special statute taking particular lands out of the control of such provision."

§ 315. Miscellaneous Enactments Causing Implied Repeal.—

Not only will inconsistent or irreconcilable subsequent independent enactments or enactments covering the same subject as that covered by an existing statute, operate to repeal such prior statute by implication, but the same result will occur by virtue of the enactment of an amendatory act,⁹² or a revision,⁹³ or codification.⁹⁴ No repeal, however, will result from a compilation.⁹⁵

§ 316. Effect of Repeal, Generally.—In the first place, an outright repeal will destroy the effectiveness of the repealed act *in futuro*, and operate to destroy inchoate rights dependent on it, as a general rule.⁹⁶ In many cases, however, where statutes are re-

⁹² *People v Zita*, 237 Ill. 434, 86 N.E. 1041. Also see *McDowell v Fuller*, 169 Mich. 332, 135 N.W. 265, and *Miller v State Entomologist*, 146 Va. 175, 135 S.E. 813, *aff'd* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568, that the amendment will operate to repeal the prior law so far as they are in conflict. Nevertheless, there is a distinction between repeal by an independent statute and by an amendatory act. *People v Lowell*, 250 Mich. 349, 230 N.W. 202.

⁹³ *Freeman v People*, 242 Ill. 152, 89 N.E. 667; *Poindexter v Pettis County*, 295 Mo. 629, 246 S.W. 38; *Litchfield v Roper*, 192 N.C. 202, 134 S.E. 651; *In re Pidgeon*, 81 Okla. 180, 198 Pac. 309; *State ex rel. Gates v Comrs. of Public Lands*, 106 Wis. 584, 82 N.W. 549.

⁹⁴ *State v Miller*, 52 Mont. 562, 160 Pac. 513; *Litchfield v Roper*, 192 N.C. 202, 134 S.E. 651.

⁹⁵ *Craig v Smith*, 84 N.J. Eq. 593, 95 Atl. 194.

⁹⁶ *Hertz v Woodman*, 218 U.S. 205, 54 L.Ed. 1001, 30 S.Ct. 621. Also see *Mahoney v State*, 5 Wyo. 520 42 Pac. 13, and *Leach v Kenyon*, 261 N.Y.S. 676. As to effect of repeal of curative act, see *Edworthy v Iowa Sav. & Loan Assn.*, 114 Iowa 220, 86 N.W. 315.

pealed, they continue to be the law of the period during which they were in force with reference to numerous matters.⁹⁷

In the second place, if the repealed statute was one which abrogated the common law, its repeal will usually operate to restore the common law.⁹⁸ Similarly, the repeal of an amendment to a prior statutory enactment restores the prior enactment to the same status which it had prior to the amendment, in the absence of a contrary legislative intent.⁹⁹ But, on the other hand, the repeal of a statute which refers to or adopts another statute does not repeal the adopted statute.¹⁰⁰

One of the most interesting and enlightening cases pertaining to the effect of repeals, is the early case of *Butler v Palmer*.^{100a} The following excerpts will shed considerable light upon our subject:

“The next question is, whether, independently of the constitution, there be any rule of legislative power, or any rule of construction, by which we are bound to say that the right of Mr. Morehouse is withdrawn from the effect of the repealing clause: indeed, whether we can say so, consistently either with authority or principle. Strong expressions may be found in the books against legislative interference with vested rights; but it is not conceivable, that after allowing the few restrictions to be found in the federal and state constitutions, any farther bounds can be set to legislative power by written prescription. Vide *Charles River Bridge v Warren Bridge*, 11 Pet. 420, 9 L.Ed. 773. Every right resting in perfect obligation is vested; and such a right being conferred by statute, renders it no more sacred than if it were sanctioned merely by the law of nature, or the common law. A state statute granting a gratuitous pension, was repealed before any payment had been made under it. And a very learned court agreed unanimously that, if the grant did not amount to a contract, the pension was gone. A majority holding that it did not, rendered a judgment in favor of the state, in an action by the pensioner for its recovery. *Dale v Governor*, 3 Stew. (Ala.) 387. Such a repeal certainly

⁹⁷ *Stevens v Dimond*, 6 N.H. 330.

⁹⁸ *People v Montgomery County*, 67 N.Y. 109. The common law rules may not be restored, if the legislature evidences an intent against their restoration. *Kohlsatt v Murphy*, 96 U.S. 153, 24 L.Ed. 844; *Patapsco Guano Co. v North Carolina Bd. of Agric.*, 171 U.S. 345, 43 L.Ed. 191, 18 S.Ct. 862.

⁹⁹ *In re Lippincott*, 119 N.J. Eq. 343, 182 Atl. 622.

¹⁰⁰ *Sika v Chicago & N. W. R. Co.*, 21 Wis. 370.

^{100a} *Butler v Palmer* (N.Y.) 1 Hill 324.

strikes one as highly impolitic. But independently of constitutional restraint, no approved writer can, I apprehend, be found either on our own, or the civil law, or the law of nature, who has denied the abstract power to repeal. Indeed, this power in our own legislature was expressly asserted and acted upon, in *People v Livingston*, 6 Wend. 526, 530; and that, too, in respect to an inchoate right of redemption. The question is thus reduced to one of mere construction on the repealing clause before us.

“The effect of such a clause on a previous statute which imposes a penalty, or confers jurisdiction upon a court, even in civil cases, is not denied. In the first case, the penalty is gone, though the repeal takes place while the prosecution for it is pending. (Cases cited.) In the latter, though the party may have instituted his suit, and it be pending at the time of the repeal, the jurisdiction is gone, and with it all his right. (Cases cited.) The repeal of a law imposing a penalty, though it take place after conviction, arrests the judgment. *Common. v Duane*, 1 Bin. (Pa.) 601, 608, 2 Am.Dec. 497. And in *Miller’s case*, the repeal was held to work the same consequence against a civil right. . . .

“A number of cases have been cited by the counsel for the defendant, and some very strong ones, to show that any enactment of the legislature annulling contracts, or creating new exceptions and defences, shall be so construed as not to affect contracts or rights of action existing at the time of the enactment. (Cases cited.) Cases are also cited, to show that a statute, in any way modifying the remedy of a party by action, shall never be so construed as to affect actions brought before the statute. (Cases cited.) But these are all cases relating to positive enactments. None of them arose on a repealing clause; and they merely recognize the well settled rule, as laid down by Best, C. J.—‘That the provisions of a statute cannot have a retrospective or ex post facto operation’. . . .

“I understand the rule of the writers of the Roman law, perfectly to agree with that acted on by our own courts, in all their decisions, ancient and modern. These writers speak of rights which have arisen under the statute not being affected by the repeal; but the context shows at once what sort of rights they mean. The amount of the whole comes to this: that a repealing clause is such an express enactment, as necessarily divests all inchoate rights which have arisen under the statute which it destroys. These rights are but an incident to the statute, and fall with it, unless saved by express words in the repealing clause. We are also reminded from Bracton and the Institutes, that *nova constitutio futuris formam imponere debet, non praeteritis*. (Bract. lib. 4, fol. 288, 2 Inst. 292.) Pufendorf, for instance, says: ‘The law itself may be disannulled by the

author; but the right acquired by virtue of that law whilst in force must remain.' He adds: 'Suppose it were a law that, as a man disposed of his possessions by will, so the right to them should stand. It would be very fair in the sovereign to retrench this liberty of testaments, and to order that, for the future, all these inheritances shall pass to the heirs at law. Yet it would be unreasonable to take away from persons what fell to them by will, while the former law was in use and vigor.' To the same effect, Dr. Taylor (p. 168) cites the Digest, that the legislator cannot amend the law which to another has created a right, adding the same instance with Pufendorf. And this instance, it will be remembered, is the same as that reported in Jenkins, viz., a devise under a statute afterwards repealed. Here the right had so passed as to be not only vested, but to stand entirely independent of the statute. I know that rights of action, and other executory rights arising under a statute, are said to be vested. (Cases cited.) They are so, and a subsequent statute ought not to repeal them, though it may do so by express words, unless they amount to a contract within the meaning of the constitution. But that being out of the way, and the statute being simply repealed, the very stock on which they were engrafted is cut down, and there is no rule of construction under which they can be saved. The very terms of the defendant's proposition, when plainly stated, would seem to show that he could have had no right, in the nature of things, after the first of November. His right to redeem depended on a statute which, he admits, had no existence at that time. The general distinction lies between those rights which are executed, and those which are executory; or, as it would have been expressed by the civil law writers, the *jus in re* acquired under the repealed statute, and the *jus ad rem* so acquired. An actual redemption before the first of November, would have presented an instance of the former; the mere right to redeem, is an instance of the latter. A right carried into judgment, or taking the form of an express executory contract under a repealed statute, might, perhaps, also stand on the same ground with the devise in Jenkins; and so of other rights having means of vitality independent of the statute. But where everything depends on this, it would seem to be equally a violation of principle as of authority to say, that any one of its provisions can be enforced or executed after it has been repealed by a general clause."

Consequently, the plaintiff, in the case above quoted from, lost his right to redeem the property he formerly owned which had been foreclosed by the defendant, even though the statute providing for the right of redemption, was in existence at the time the foreclosure decree was entered, since the right had not been exercised prior to the statute's repeal without a saving clause.

This same view has been taken with respect to the effect of a repeal of a statute which provides for the punishment of a penal offense, and seems to prevail generally, such view being well expressed in *State v Addington* (2 Bailey (S.C.) 516, 23 Am. Dec. 150) :

“In civil suits, whether founded on contract, or for tort, the universal rule is, that the liability of the defendant and the measure of the plaintiff’s right, must be resolved according to the laws existing at the time of the contract made, or the wrong done; and according to the same principle, when an offense has been committed against the State, and the Legislature superadd accumulated punishment for the offense generally, the culprit will be punished according to the old law, for a different rule would give it an *ex post facto* operation. When, however, the new law repeals the law creating the offence, or substitutes a mitigated punishment, Sergeant Hawkins says, that the offender cannot be punished in respect of the former law. 1 Hawk. P.C. ch. 40, § 6. This is doubtless an exception to the general rule, founded on principles of humanity; . . . but for the most obvious reasons, it can never apply to *res judicata*; for when once the final judgment is pronounced, the power of the court over the subject matter is at an end; and all that remains to be done, is the mere ministerial act of doing execution. This principle is plainly inculcated by Chief Justice Marshall, in the case of *Yeaton v United States*, 5 Cranch, 281, 3 L.Ed. 101, where, in giving effect to the rule, that after the repeal, or expiration of a law, no penalty can be enforced, nor punishment inflicted, for violations of it whilst in force, he expressly proceeds on the ground, that no definitive sentence has been pronounced. After final judgment, there is no means by which the court can regain possession of the cause; and execution follows as a necessary consequence.”

Nevertheless, the legal principle above discussed will have no application, even in criminal cases, where the later enactment is couched in substantially the same language as was used in the prior law. As the court said in *Sage v State* (127 Ind. 15, 26 N. E. 667) :

“Principle forbids the conclusion that an amendatory statute defining an offence in substantially the same language as that employed in the statute it amends, takes away the right of the state to prosecute the offender and requires his unconditional discharge. It can not be logically affirmed, where the same offence is defined in the same way by both the earlier and the later statute, that there is an interregnum in which there was no law defining the offence. The two acts interfuse and blend so fully and compactly that it is impossible that there can be an interval when there is no law. Between the two acts there is no period of intervening time in which no offence

existed. The duration of the statute was unbroken and continuous, and the crime one and the same. The amendatory act creates no new offence, nor does it absolve an offender from one previously committed; it simply re-enacts the earlier statute, so that the offence is the same under the one act as under the other. If a new offence had been defined, or new elements added to the crime as defined by the earlier act had ceased to exist, but where the offence remains unchanged from the first to the last there is no plausibility in the argument that when the amendatory statute took effect the crime ceased to exist. There can be no plausibility in such an argument for the plain reason that there was no interval when the crime was not punishable, inasmuch as there was not an instant of time when there was not a law defining and denouncing it. The succession of the statutes was unbroken and the reign of law uninterrupted.

“The conclusion to which the appellant’s argument leads goes far to prove it unsound. If the argument is valid, then a man guilty of an offence, such as that of which the appellant was convicted, could not be punished if the crime was committed in 1881, although it had remained undiscovered until 1890. Again, if the crime was committed during the last hour before the act of 1889 went into effect, the offender could not, according to the appellant’s theory of the law, be punished at all. A doctrine which leads to such results has nothing to commend it, and it would be a sacrifice of substance to a fancied demand of consistency to yield to it. To that demand we are not disposed to assent.”

After all, whether the repeal of a statute will operate to destroy a right created by a prior enactment, will depend upon a distinction very similar to, if not identical with that which exists between rights which are vested and rights which are not. There may be a few exceptions, but for most purposes the principles pertaining to vested rights will generally determine the effect of a repeal on rights founded upon the repealed law. At least, the distinctions will in most cases overlap or coincide.

§ 317. Effect on Vested Rights.—Although some of the cases go so far as to say that the unqualified repeal of a statute as effectually destroys rights and liabilities dependent upon it, not past and concluded, as if the statute had never existed,¹⁰¹ it is perhaps

¹⁰¹ *Blake v State*, 178 Ala. 407, 59 So. 623; *Wall v Chesapeake etc. R. Co.*, 290 Ill. 227, 125 N.E. 20, err. dis. 256 U.S. 125, 41 S.Ct. 402; *Parr v Painter*, 78 Ind. Ap. 639, 137 N.E. 70; *Gordon v State*, 4 Kan. 489; *Beljer v Zawadski*, 252 Mich. 14, 232 N.W. 746; *Westmeyer v Gallenkamp*, 154 Mo. 28, 55 S.W. 231; *Wikel v Jackson County*, 120 N.C. 451, 27 S.E. 117.

more accurate to say that "an unqualified repeal operates to destroy inchoate rights, as a release of obligations, and as a remission of penalties and forfeitures dependent upon it".¹⁰² But rights which have become vested under the repealed law, no matter whether they have been acquired under a contract¹⁰³ or have arisen by virtue of a tort claim,¹⁰⁴ will not be destroyed by repeal of the statute under which such rights became vested. Similarly, an unqualified repeal will not take away the right to recover a penalty, which has been reduced to a judgment.¹⁰⁵ The same is equally true with reference to statutes imposing liabilities.¹⁰⁶ But retrospective operation of a repeal may be easily avoided through the use of a saving clause, so that even inchoate rights may be preserved intact. Such clauses, whether attached to the repealing act, or existing in the form of a general statute, will easily include vested rights under the language usually used—that the repeal of a statute shall not affect any duty imposed, rights accrued, or proceedings commenced thereunder.

Consequently, at least in the absence of a saving clause, the problem created by the repeal of a statute, is simply to determine whether the repeal destroys or impairs a vested right. If the right created by the repealed law, at the date the repeal becomes effective, has not vested, then it may be impaired or totally abrogated by the new enactment. In other words, the right involved must be scrutinized carefully in order to ascertain its real nature. This simply means the application of the general rule of law applicable in cases concerned with the unlawful retrospective effect of legislation, generally. If the repeal merely abrogates a remedy as distin-

¹⁰² *Hertz v Woodman*, 218 U.S. 205, 30 S.Ct. 621, 54 L.Ed. 1001. Also see *Van Inwagen v Chicago*, 61 Ill. 31.

¹⁰³ *Pacific Mail Steamship Co. v Joliffe (U.S.)* 2 Wall. 450, 17 L.Ed. 805; *Bank of Norman Park v Steinmitz*, 169 Ga. 534, 150 S.E. 841; *Reisler v Dempsey*, 173 N.Y.S. 212.

¹⁰⁴ *Layher v Chicago-Sandoval Coal Co.*, 179 Ill. Ap. 476; *Gorman v McArdle*, 22 N.Y.S. 479.

¹⁰⁵ *State v Youmans*, 5 Ind. 280. Also see *Parlelee v Lawrence*, 44 Ill. 405; *Gaul v Brown*, 53 Me. 496; *State v American Bonding Co.*, 128 Md. 268, 97 Atl. 529; *Continental Oil Co. v Montana Concrete Co.*, 63 Mont. 223, 207 Pac. 116; *Common. v Standard Oil Co.*, 101 Pa. 119; *Miller v Chicago etc. R. Co.*, 133 Wis. 183, 113 N.W. 384.

¹⁰⁶ *Crawford v Hedrick*, 9 Ind. Ap. 356, 36 N.E. 771. Also see *Cavanaugh v Patterson*, 41 Colo. 158, 91 Pac. 1117, and *U.S. v The Helen (U.S.)* 6 Cranch. 203, 3 L.Ed. 199.

guished from a right, there is no interference with a vested right. A repeal may, therefore, abrogate any statute which simply provides a remedy for the enforcement of a right, except in those cases where the right is also created by the repealed statute, in which event the right will also terminate, unless it has attained that status where it can stand entirely independent of the statute, or has become a *jus in re* as distinguished from a *jus ad rem*, which, after all is simply the difference between a right which has matured and one which is inchoate.¹⁰⁷

§ 318. Effect on Remedies.—If the repealed statute merely created a remedy as distinguished from a right, as pointed in the preceding section, its repeal destroys the remedy, even though the act calling for the remedy came into existence during the lifetime of the statute, provided no remedy existed at common law.¹⁰⁸ Nevertheless, and as one may infer from the foregoing general rule, the repeal may not always completely abrogate the remedy.¹⁰⁹

An illustration or two will perhaps give a clearer understanding of the effect of the repeal of a statute upon remedies provided for by it. Take the case of *Bear Lake Irrigation Co. v Garland* (164 U. S. 1, 17 S.Ct. 7, 41 L.Ed. 327):

“The answer is that the mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff’s claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the right or the remedy, as those terms are used in the statute, nor did it in

¹⁰⁷ *Butler v Palmer* (N.Y.) 1 Hill. 324. “Rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them”, are vested rights. *Moore v State*, 43 N.J. L. 203. Also see *Downs v Blount*, 170 Fed. 15, that a vested right may be defined as “some right or interest in property that has become fixed and established, and is no longer open to doubt or controversy.”

¹⁰⁸ *Bailey v Mason*, 4 Minn. 546; *Cope v Hampton County*, 42 S.C. 17, 19 S.E. 1018.

¹⁰⁹ In this regard, also see § 287, *supra*.

any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have commenced under the old statute. The new statute was prospective in its operation, even as applied to this case. Of course, if the new act had curtailed the time in which to bring the action, after the time had commenced to run under the old statute, totally different considerations would spring up, and what was a mere alteration of procedure, having really nothing to do with a remedy in the one case, might, in the other, most seriously affect it, and hence come within the proviso in question. . . .

“It may be assumed that where a statute creates a right not known to the common law, and provides a remedy for the enforcement of such right, and limits the time within which the remedy must be pursued, the remedy in such case forms a part of the right, and must be pursued within the time prescribed, or else the right and remedy are both lost.”

Moreover, in *Wright v Oakley* (5 Metc. (Mass.) 400), where the revised statutes provided, in general terms, for the repeal of all acts and parts of acts therein revised, which are repugnant, etc., with the exceptions and limitations therein expressed, and a section of such statute further provided that the repeal of the acts therein mentioned “shall not affect any act done, or any right accruing or accrued, or established, or any suit or proceeding had or commenced in any civil case before the time when such repeal shall take effect; but the proceedings in every such case shall be conformed, when necessary, to the provisions of the revised statutes”, the court in ascertaining the effect of the revision upon the alteration of the statute of limitations through a lengthening of its period, reviewed the law applicable in these terms:

“The first remark which presents itself upon this provision is that it shows an anxious desire, on the part of the legislature, that the revised statutes should take up the existing rights and relations of parties, as fixed and regulated by law, and that their operation upon all rights and relations should be future and prospective. And yet so far as statutory amendments, in the course of legal proceedings, were supposed to have been affected by those statutes, it was intended that they should have an immediate operation. But the great difficulty is, in discriminating between that which may affect the rights of a party, and that which merely regulates the course of proceeding; because the establishment of a right may often depend

upon that course of proceeding. Suppose, for instance, that an action was pending in April, 1836, and came on for trial in May following—the revised statutes having in the meantime taken effect. In many cases, these statutes modify rules of evidence, by rendering witnesses competent, who were incompetent before, or the reverse. This is a mere regulation of the proceeding, and is subsequent to the time when the revised statutes took effect, and is therefore regulated by them. But by thus changing the mode of proof, by a change of the rules of evidence, the plaintiff may fail of proving his case, or the defendant be deprived of the grounds of his defence. The case of *Bickford v Boston & Lowell Rail Road*, 21 Pick. 109, was one where the revised statutes authorized a trustee, on scire facias, to make a new answer, which he could not do before. It was held, that it was a mere regulation of the proceeding, not affecting an act done or right fixed, and was therefore allowable, although it may be that the recovery of the plaintiff depended upon it. See also *Burnside v Newton*, 1 Metc. 426. It is obvious therefore that these two provisions, the one, that the revised statutes shall not affect an act done or right accrued, and the other, that legal proceedings shall be conformed to them when necessary, are to some extent conflicting with each other, and in some instances cannot be both obeyed. It becomes therefore necessary, in such cases, for courts to decide according to the true intent and purpose of the legislature, which rule shall be applied to the particular case; and this must often depend much more upon a just and discriminating view of the objects of the law, than upon a literal application of its terms. In the case of *Sawyer v Bancroft*, 21 Pick. 210 . . . it was held that the costs of an appeal were regulated by the law as it stood before the revised statutes, although the trial and appeal took place in the court of common pleas after the revised statutes took effect, and although, literally, a trial and appeal are but legal proceedings; because, as the court said, that rule would best carry into effect the intent of the legislature. The case of *Gay v Richardson*, 18 Pick. 417, is to the like effect. There it was held, that the revised statutes, giving costs to the party prevailing on a writ of error, did not apply to a judgment reversed after they went into operation, on a writ of error brought before.

“The difficulty of applying this repealing clause of the revised statutes to the statute of limitations arises from the maxim, that the statute of limitations affects the remedy only, and therefore it is inferred, that it does not affect the right, inasmuch as rights and remedies are often, and in many cases very justly, spoken of as contradistinguished from each other. But this is far from being always a just conclusion. It would be more accurate to say, that the statute of limitations bars the remedy, but does not extinguish the cause of action. But in

truth, the statute of limitations, though only barring the remedy, does thereby deeply affect the rights of parties. . . . In many respects, the rights of parties do depend upon the statute. After such a bar is fixed, parties feel justified in forbearing to take and preserve evidence, and to retain proofs and vouchers, as they would otherwise; and they feel, and act upon the conviction, that such causes of action are at an end. And although it cannot be said in technical strictness, that a man has a vested right to plead the statute of limitations, so that it could not be taken away by an express act of the legislature; yet here we are inquiring what the legislature intended by the use of language not repealing or professing to repeal the statute, but modifying and continuing it, with a general saving of all rights accruing or accrued, and not affecting any act done; and we are of opinion, that the legislature did not intend to take away the right, power or privilege of being protected, for the future, against actions then actually barred by the pre-existing law."

Even in a criminal case, the mode of procedure and the rights of the defendant may be so closely interlocked that the repeal of the former may affect the latter, as is indicated by the court in *Sage v State* (127 Ind. 15, 26 N. E. 667), although this court held no such result took place where a statute which provided that one who counseled the committance of a felony should be deemed an accessory before the fact, and tried and punished as if he were a principal, was amended to read that every person who shall counsel the commission of a felony may be charged and tried as if he were a principal:

"There is, in our judgment, no substantial difference between the two acts, except as to the matter of the remedy, for the elements of the crime are the same under the one statute as under the other. . . . It is of little importance that a name or title is altered or omitted where the body of the offence remains the same, and it does in this instance, so remain. The omission to give the offence defined a formal name neither adds to the burden of the accused nor diminishes that of the State. No less evidence would be required on the part of the accused to secure an acquittal under the later statute than was required under the earlier. In no particular whatever, save as to the remedy, does the amendatory statute work any change.

"It is possible that the doctrine asserted by the majority of the court in *Kring v Missouri*, 107 U. S. 221, 2 S.Ct. 443, 27 L.Ed. 506, does in some degree impinge upon the general rule asserted by the decided weight of authority, but that decision does not go to the extent of breaking down the general rule so long approved by the courts and the text-writers, for

the utmost that can be said of that decision is that it declares that the mode of procedure may sometimes so far and materially affect the rights of an accused as to fall within the sweep of the constitutional provision prohibiting the enactment of ex post facto laws; but giving to that decision the comprehensive effect just ascribed to it, still the act of 1889 is not within its scope, for the reason that the provisions of the act affect the remedy purely, and they neither make it easier for the state to convict nor harder for the accused to secure an acquittal. In short, that act, justly interpreted, simply affects the mode of pleading, and that only to the extent of providing an additional mode of presenting the charge."

§ 319. Effect of Repeal of Repealing Act.—At common law, when a statute was repealed which repealed a former law, the former statute was revived and again became operative without any formal words on the part of the legislature to that effect,¹¹⁰ unless a contrary intention was expressed or implied in the repealing act.¹¹¹ Under this situation, the original act became effective by virtue of its original enactment.¹¹² Moreover, there was a presumption that, when the legislature repealed the repealing act, without any reference to the pre-existing law, it intended thereby to restore the law as it existed under the repealed act.¹¹³ In order to avoid this result, statutes often provide that the repeal of a repealing act shall not restore the old law, unless there is an express provision to that effect.¹¹⁴ Where this is the case, the repeal will

¹¹⁰ U.S. v Philbrick, 120 U.S. 52, 30 L.Ed. 559, 7 S.Ct. 413; *Faucette v Patterson*, 140 Ark. 628, 216 S.W. 300; *Lindsay v Lindsay*, 47 Ind. 283; *Applestein v Osborne*, 156 Md. 40, 143 Atl. 666; *Lawton v Common.*, 232 Mass. 28, 121 N.E. 518; *James v Dubois*, 16 N.J.L. 285; *Gallegos v A. T. & S. F. Ry. Co.*, 28 N.M. 472, 214 Pac. 579; *Chard v Holt*, 136 N.Y. 30, 32 N.E. 740; *Brinkley v Swicegood*, 65 N.C. 626; *Manchester Township Suprs. v Wayne County Comrs.*, 257 Pa. 442, 101 Atl 736; *State v Mines*, 38 W.Va. 125, 18 S.E. 470. Also see detailed treatment of revivals, §321, *infra*.

¹¹¹ *Applestein v Osborne*, 156 Md. 40, 143 Atl. 666; *Gallegos v A. T. & S. F. Ry. Co.*, 28 N.M. 472, 214 Pac. 579. Also see U.S. v Philbrick, 120 U.S. 52, 30 L.Ed. 559, 7 S.Ct. 413.

¹¹² *Clark v Reynolds*, 136 Ga. 817, 72 S.E. 254; *Coe v Aroostock County*, 64 Me. 31.

¹¹³ *Butner v Boifeuillet*, 100 Ga. 743, 28 S.E. 464.

¹¹⁴ See § 321, *infra*, for treatment of revival. And see § 371, *infra*, for a statute of this type.

not reinstate the original statute,¹¹⁵ unless the legislature expresses the intent that it be reinstated,¹¹⁶ and it does not matter, so it seems, that the repeal is only by implication.¹¹⁷

§ 320. Invalid Repealing Acts.—In order for a repealing act to be effective, it may be stated as a general rule, that it must be constitutional and valid,¹¹⁸ since a void or ineffective act obviously cannot operate to abrogate a valid existing one.¹¹⁹ Nevertheless, the incorporation of language in a repealing act which reveals an intent to repeal regardless of its unconstitutionality, may effect a repeal,¹²⁰ as the court announced in *State ex rel. Law v Blend* (121 Ind. 514, 23 N.E. 511):

“In the case of *Meshmeir v State*, 11 Ind. 482, it was held that a repealing clause attached to an unconstitutional act of the legislature might repeal a former valid statute upon the same subject. The general principle announced in that case is undoubtedly correct, for it must be conceded that the legislature may use such language as to leave no doubt as to its intention to repeal a former law, in any event. In such case the law intended to be repealed would cease to exist even though the law to which the repealing clause was attached would fail by reason of being in conflict with the constitution.

¹¹⁵ *U.S. v Boasberg*, 283 Fed. 305; *Faucette v Patterson*, 140 Ark. 628, 216 S.W. 300; *Yolo County v Colgan*, 132 Calif. 265, 64 Pac. 403; *Heinssen v State*, 14 Colo. 228, 23 Pac. 995; *Sullivan v People*, 15 Ill. 233; *People v Sweitzer*, 266 Ill. 459, 107 N.E. 902; *Edworthy v Iowa Sav. Assoc.*, 114 Iowa 220, 86 N.W. 315; *In re Schneck*, 78 Kan. 207, 96 Pac. 43; *Rice v Common.*, 22 Ky.L. 1793, 61 S.W. 473; *State v De Bar*, 58 Mo. 395; *People v Steuben County*, 85 N.Y.S. 244, 41 Misc. 590; *Common. v Brennan*, 258 Pa. 1, 101 Atl. 947; *Smith v Hoyt*, 14 Wis. 252.

¹¹⁶ *Ibid.*

¹¹⁷ *Milne v Huber*, 17 Fed. Cas. No. 9,617.

¹¹⁸ *American Wood Products Co. v City*, 35 Fed. (2) 657; *Woco Pep Co. v City of Montgomery*, 213 Ala. 452, 105 So. 214; *Polk v Booker*, 112 Ark. 101, 165 S.W. 262; *Jones v State*, 151 Ga. 502, 107 S.E. 765; *Bissett v Pioneer Irr. Dist.*, 21 Idaho 98, 120 Pac. 461; *Rippinger v Niederst*, 317 Ill. 264, 148 N.E. 7; *Burnam v Common.*, 228 Ky. 410, 15 S.W. (2) 256; *Geyer v Buck*, 175 N.Y.S. 613; *Guire v Board of Comrs.*, 178 N.C. 39, 100 S.E. 141; *State v Mundy*, 53 N.D. 249, 205 N.W. 684; *Venn v State*, 35 Tex. Cr. 151, 210 S.W. 534.

¹¹⁹ *Conlon v Adamski*, 77 Fed. (2) 397; *State ex rel. v Judicial Dist. (Nev.)* 83 Pac. (2) 1031.

¹²⁰ *People v Fox*, 294 Ill. 263, 128 N.E. 505; *Childs v Shower*, 18 Iowa 261; *Campau v Detroit*, 142 Mich. 276; *Rosenfield v Drake*, 112 Pa. Super. 1, 170 Atl. 414. And note specially *State ex rel. Law v Blend*, 121 Ind. 514, 23 N.E. 511.

“Where, however, it is not clear that the legislature, by a repealing clause attached to an unconstitutional act, intended to repeal the former statute upon the same subject, except upon the supposition that the new act would take the place of the former, the repealing clause falls with the act to which it is attached.”

Yet, the authorities seem generally to support the view that there will be no repeal by implication, where the repealing act is invalid,¹²¹ even though the act expressly states that it repeals all laws or parts of laws inconsistent therewith.¹²² After all, it is obvious that where the repealing act is invalid, there is nothing with which an existing law can be inconsistent and thereby be repealed by implication.¹²³

Suppose, however, that the repealing act is not wholly invalid? The answer will be found in *Ulman v State* (137 Md. 642, 113 Atl. 124):

“The legislative intent, which is important in reference to the dependence of the validity of one part of a statute upon the validity of another part, relates to conditions as they exist at the time of the passage of the statute, and not to those brought about by subsequent events. If a statute is valid in all its parts at the time of enactment, then if conditions subsequently arise which make enforcement of a part of the statute impossible, the question becomes, not what the men who made the law would have done if they could have looked into the future, but whether the remaining part of the statute could be enforced without doing violence to the purpose of the whole act; in

¹²¹ *Frost v Corporation Comm.*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483; *Ex parte Gayles*, 108 Ala. 514, 19 So. 12; *Ex parte Merrit*, 80 Ark. 203, 96 S.W. 983; *Ex parte Sohncke*, 148 Calif. 262, 82 Pac. 956; *People v Fox*, 294 Ill. 263, 128 N.E. 505; *Stephens v Ballou*, 27 Kan. 954; *Common. v Moore*, 187 Ky. 494, 219 S.W. 786; *State v Dalcourt*, 112 La. 420, 36 So. 479; *State ex rel. Crouse v Mills*, 231 Mo. 493, 133 S.W. 22; *People v Menching*, 187 N.Y. 8, 79 N.E. 884. *Contra*: *Childs v Shower*, 18 Iowa 261.

¹²² *Ex parte Clary*, 149 Calif. 732, 87 Pac. 580; *People v Fleming*, 7 Colo. 230, 3 Pac. 70; *Hendricks v Gamble*, 217 Ill. Ap. 422; *Childs v Shower*, 18 Iowa 261; *Price v Fox*, 220 Ky. 373, 295 S.W. 433; *Detroit v Western Union Tel. Co.*, 130 Mich. 474; *State v Luscher*, 157 Minn. 192, 195 N.W. 914; *State v Thomas*, 138 Mo. 95, 39 S.W. 481; *State v Ehr*, 57 N.D. 310, 221 N.W. 883; *Ex parte Masters*, 126 Okla. 80, 258 Pac. 861; *Portland v Schmidt*, 13 Ore. 17, 6 Pac. 221.

¹²³ *Tims v State*, 26 Ala. 165; *People v Fox*, 294 Ill. 263, 128 N.E. 505; *Campau v Detroit*, 14 Mich. 276; *Copeland v St. Joseph*, 126 Mo. 417, 29 S.W. 281; *State v Judge of LaCrosse County Court*, 11 Wis. 50.

other words, whether any part of the purpose of the act can be subserved by the enforcement of such part as has not been nullified”.

This same answer would also be applicable where the partial invalidity existed from the very beginning of the statute's existence. If any parts of the repealing act could stand, such parts would repeal pre-existing law expressly referred to, or with which they were in irreconcilable repugnancy, or conflict.

In those cases where the repealing act is invalid or unconstitutional, the question naturally arises as to its effect before it has been adjudicated invalid. The repealed act is regarded in some jurisdictions as in force from the time the repealing act is declared void, provided the result gives effect to the intent of the legislature.¹²⁴ In other words, the repealing act is effective until it has been declared invalid. But the more logical view, however, would be inclined to recognize the ineffectiveness of the repeal from the day of its enactment, for it is difficult to see how an invalid law could ever be effective.

§ 321. Revival.—After a statute has been repealed, it may again become operative as law, either through the enactment of legislation expressly reviving it,¹²⁵ or by the operation of law.¹²⁶

¹²⁴ Talbott v Des Moines (Iowa) 257 N.W. 393.

¹²⁵ Fancette v Paterson, 140 Ark. 628, 216 S.W. 300; People v Miner, 46 Ill. 367; Kirkpatrick v Common., 95 Ky. 326, 25 S.W. 113; People v Bell, 38 N.Y. 386; Common. v Churchill (Mass.) 2 Metc. 118. Upon revival, a statute becomes effective in the same form as when it previously expired. The Aurora (U.S.) 7 Cranch. 383, 3 L.Ed. 378. Also see Alabama Branch Bank v Kirkpatrick, 5 Ga. 34.

¹²⁶ It is important to note that a subsequent removal of the constitutional objections to the validity of a statute does not restore the statute to the status of law. Atkinson v Southern Express Co., 94 S.C. 444, 78 S.E. 516, 94 S.C. 457, 78 S.E. 520. And some authorities hold that an unconstitutional repealing act, when adjudicated unconstitutional, operates to revive the act sought to be repealed. Nash v Lynch, 235 N.Y. 517, 226 Ap. Div. 421. The great weight of authority, however, is to the effect that an unconstitutional repealing act leaves the original act still in force so that a revival is not necessary to restore it to the status of law. Chicago, R. I. & P. R. Co. v McClanahan, 151 Ark. 77, 235 S.W. 380; Hendricks v Gamble, 217 Ill. Ap. 422; Ward v Common., 228 Ky. 468, 15 S.W. (2) 276; Smith v Chickasaw County, 156 Miss. 171, 125 So. 96; Bissett v Pioneer Irr. Dist., 21 Idaho 98, 120 Pac. 461; Board of Educ. v Hunter, 48 Utah 373, 159 Pac. 1019. Also see Guire v Board of Comrs., 178 N.C. 39, 100 S.E. 141.

We have already indicated how the latter may occur upon the repeal of a repealing act.¹²⁷

Constitutions sometimes provide that no act shall be revived simply by reference to title.¹²⁸ Where such a provision exists, in order to revive the repealed act, that portion sought to be revived must be re-enacted and published at length,¹²⁹ or set out at length in the reviving act,¹³⁰ as in the case of new legislation. Such a provision is mandatory,¹³¹ but it has no effect upon the doctrine of revival by operation of law.¹³² On the other hand, in the absence of a provision of this character, an act may be revived simply by reference to its title.¹³³

Anti-revival statutes, however, exist in several states.¹³⁴ Such a statute has been applied to implied as well as to express repeals.¹³⁵

¹²⁷ See § 286, *supra*. And note *In re Sloan's Estate* (Calif. Ap.) 46 Pac. (2) 1007, that while the repeal of a statute which abrogates a former statute does not revive the former statute, the repeal of a statute that was declaratory of the common law does not necessarily abolish the common law rule.

¹²⁸ Some authorities also apply this requirement to revivals by operation of law, at least, to the extent of prohibiting a revival upon the repeal of a repealing statute. *Renter v Bauer*, 3 Kan. 503; *State v Cloudt* (Tex.) 258 S.W. 248. Others hold that it does not apply to such revivals. *Wallace v Bradshaw*, 54 N.J.L. 175, 23 Atl. 759; *Manchester Township v Wayne County*, 257 Pa. 442, 101 Atl. 736. Also see *Faucette v Paterson*, 140 Ark. 628, 216 S.W. 300.

¹²⁹ *Manchester Township v Wayne County*, 257 Pa. 442, 101 Atl. 736. Also note *supra*, § 121.

¹³⁰ In this connection, also see *supra*, § 121.

¹³¹ *State v Kirkpatrick*, 19 Ala. Ap. 50, 95 So. 490, cert. den. 209 Ala. 16, 95 So. 494; *State v Brugh*, 5 Ind. Ap. 592; *Renter v Bauer*, 3 Kan. 503; *Moore v Tunica County*, 143 Miss. 821, 107 So. 659, mot. den. 143 Miss. 839, 108 So. 900; *State v O'Brien*, 95 Ohio St. 166, 115 N.E. 25; *Upper Merion Township v Borough of Bridgeport*, 299 Pa. 297, 149 Atl. 490; *State Bank v Cloudt* (Tex.) 258 S.W. 248.

¹³² *Wallace v Bradshaw*, 54 N.J.L. 175, 23 Atl. 759. Also see *Manchester Township Suprs. v Wayne County Comrs.*, 257 Pa. 442, 101 Atl. 736.

¹³³ *State v Elder*, 19 N.M. 393, 143 Pac. 482; *In re Barry*, 12 R.I. 51; *Quinlan v Houston R. Co.*, 89 Tex. 356, 34 S.W. 738.

¹³⁴ See *Sullivan v People*, 15 Ill. 233; *Goodno v Oshkosh*, 31 Wis. 127. For Federal statute, see U.S. Code, tit. 1, c 2, § 28 (1 U.S.C.A., § 28). Such a statute does not apply to amended legislation. *City of Hannibal v Guyott*, 18 Mo. 515.

¹³⁵ *Stirman v State*, 21 Tex. 734. *Contra*: *State ex rel. Tyler v King*, 104 Tenn. 156, 57 S.W. 150.

but has been held inapplicable to an act suspending a repealing act.¹³⁶ Nevertheless, anti-revival statutes, if applicable to implied as well as to express repeals, would eliminate many, if not most, of the troublesome problems due to the repeal of repealing acts,¹³⁷ where no saving clause was involved.

Shaw, C. J., in *Commonwealth v Churchill*,¹³⁸ reveals the historical basis for the general rule that the repeal of a repealing act revives the pre-existing statute:

“It is conceded to be a maxim of the common law, applicable to the construction of statutes, that the simple repeal of a repealing act, not substituting other provisions in the place of those repealed, revives the pre-existing law. As a maxim of the common law, it was in force here when the constitution of the Commonwealth was adopted. By that constitution, it was declared that ‘all the laws, which have heretofore been adopted, used and approved in the colony, province, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.’ This constitution has been construed as adopting the great body of the common law with those statutes made before the emigration of our ancestors, which were made in amendment of the common law, so far as these rules and principles were applicable to our condition and form of government.

“But it was contended, at the argument, that under this provision no principle or rule of the common law could be regarded as adopted, unless it could be shown affirmatively that it had been adjudicated before the revolution. But we apprehend this would be much too narrow a construction. Before the revolution, we had no regular reports of judicial decisions; and the most familiar rules and principles of law—those which lie at the foundation of our civil and social rights—could not be so proved. No: We rely on usage and tradition and the well known repositories of legal learning, works of approved authority, to learn what are the rules of the common law; and we have no doubt that these were the great sources to which the above pregnant provision of our constitution refers.

“Taking it then as well established that the rules and maxims of the common law, referred to in the constitution,

¹³⁶ *Brown v Barry (U.S.)* 13 Dall. 365, 1 L.Ed. 638; *Cassell v Lexington etc. R. Co. (Ky.)* 9 S.W. 502.

¹³⁷ For a typical statute of this type, see Chapter XXXI, § 371, *infra*.

¹³⁸ *Commonwealth v Churchill (Mass.)* 2 Metc. 118.

were those which our ancestors brought with them, and which had been, to some extent, modified and adapted to our condition by the legislative jurisprudence of the colonial and provincial governments, it follows that these rules and principles were regarded as binding both upon legislators and judges in their respective departments. A part of this system are the well known rules of construction for the expounding of statutes, which are as much a part of every statute as its text. These are presumed to be known and kept in view by the legislature in framing the statute; and they must be alike regarded by judges in expounding it".

And, as pointed out in *People v Montgomery*,¹³⁹ this rule of the common law is based upon the theory that each legislative enactment expresses the legislative intent at the time of such enactment, and that a repealing act indicates a change of the legislative purpose as expressed in the prior law; and that therefore, when a repealing act is in turn repealed, without reference to the pre-existing law, the presumption is that the legislature intended to restore the order of things existing under the repealed statute. But where a contrary intention appears, either expressly or by necessary implication, this presumption does not exist, and the former law will not be revived.¹⁴⁰

§ 322. Simultaneous Repeal and Re-Enactment.—Often the legislature instead of simply amending a pre-existing statute, will repeal the old statute in its entirety and by the same enactment re-enact all or certain portions of the pre-existing law. Of course, the problem created by this sort of legislative action involves mainly the effect of the repeal upon rights and liabilities which accrued under the original statute. Are those rights and liabilities destroyed or preserved? The authorities are divided as to the effect of simultaneous repeals and re-enactments. Some adhere to the view that the rights and liabilities accruing under the repealed act are destroyed, since the statute from which they sprung has actually terminated, even though for only a very short period of time.¹⁴¹ Others, and they seem to be in the majority, refuse to accept this view of the situation, and consequently maintain that all rights and

¹³⁹ *People v Montgomery*, 67 N.Y. 109.

¹⁴⁰ *United States v Philbrick*, 120 U.S. 52, 7 S.Ct. 413, 30 L.Ed. 559; *People v Montgomery*, 67 N.Y. 109.

¹⁴¹ *Coffin v Rich*, 45 Me. 507, 71 Am.Dec. 71. Also see *Moore v Common.*, 155 Va. 1, 155 S.E. 635, where the rule is mentioned. For other cases note 11 Ann. Cas. 474.

liabilities which have accrued under the original statute are preserved and may be enforced, since the re-enactment neutralizes the repeal, thereby continuing the law in force without interruption.¹⁴² Logically, the former attitude is correct, for the old statute does cease to exist as an independent enactment, but all practical considerations favor the majority view. This is so even where the statute involved is a penal act.¹⁴³

§ 323. Expiration, Suspension, and Desuetude. — Many laws are of a temporary nature, and obviously such laws expire of their own force when the time arrives for their expiration. Even statutes of this type are not without their problems of construction. For instance, can a statute be operative for a specified period and then inoperative for a specified period and then become operative again? Such an enactment was involved in *Stevens v Dimond*¹⁴⁴ where the legislative act provided that if “any horse, etc. shall be found going at large from and after the first day of April until the last day of October, in any street, highway, or common in said town, the owner thereof shall, for each and every offence forfeit and pay the sum of four dollars, with costs of suit, to any person who may sue for the same”. Said the court in deciding the case:

“The question, then, is, did the by-law in this case cease to be in force after the year, so that no action for a penalty incurred under it can now be maintained?

“There is nothing in the by-law itself which, in express terms, declares it shall not be in force after the year. When the period it was intended to regulate expired, it, without doubt, ceased to be a rule to regulate what was done afterwards. But did it cease to be a law of that period?

“In many cases statutes that are repealed, or that cease to be in force by their own limitation, continue to be the law of the period when they were in force. It is, however, settled, that this is not the case with laws inflicting penalties. When these expire by their own limitations, or are repealed, they cease to be the law in relation to the past as well as the future, and can

¹⁴² *Bear Lakes etc. Water Works Co. v Garland*, 164 U.S. 1, 17 S.Ct. 7, 41 L.Ed. 327; *Florida Cent. etc. Co. v Foxworth*, 41 Fla. 1, 25 So. 338; *White Sewing Machine Co. v Harris*, 252 Ill. 361, 96 N.E. 857; *Heath v State*, 173 Ind. 296, 90 N.E. 310; *Haspel v O'Brien*, 218 Pa. St. 146, 67 Atl. 123; *Van Dyke's Appeal*, 217 Wis. 528, 259 N.W. 700, 98 A.L.R. 1332.

¹⁴³ *Forbes v Board of Health*, 27 Fla. 189, 9 So. 446; also see 94 Am.Dec. 220.

¹⁴⁴ *Stevens v Dimond*, 6 N.H. 330.

no longer be enforced in any case. No case is, however, to be found in which it was ever held before that they thus ceased to be law, unless they expired by express limitation in themselves, or were repealed. It has never been decided that they cease to be law merely because the time they were intended to regulate had expired. Many laws have been passed which were limited in their operation to particular seasons of the year. This was the case with the statutes which regulated the hunting of deer, and the taking of fish in rivers and ponds. But it is imagined that no one ever supposed that those laws expired by their own limitations every time the season they were intended to regulate expired, and revived again with the return of the season. The same is the case with the statutes regulating the observance of the sabbath. The statutes apply only to one day in the week. But we imagine no person will contend that they remain in force only during Sunday.

“A very little consideration of the subject will convince any one that a limitation of the time to which a statute is to apply, is a very different thing from the limitation of the time a statute is to continue in force.”

A similar problem also arises, where a statute is temporary and limited to a given number of years, as to its effect upon a statute which has been repealed and supplied by it. In such a case, the repealed statute is revived *ipso facto*.¹⁴⁵

Legislative enactments may be suspended, as well as repealed, and so far as immediate effect is concerned, there is little practical difference. Accordingly, where a statute provided that “if a majority of the votes cast are for prohibition, said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed bounds . . . until such time as the qualified voters therein may, at a legal election held for the purpose, by a majority vote decide otherwise”, the court construed the statute “as giving the voters interested an opportunity to decide — after the expiration of twelve months, mentioned in the fourth section — by vote whether the prohibition named in the first section shall be longer continued or not, and that a majority vote at this second election would annul, from the time it is held and the result declared and published, the prohibition provided for in the first section of the act”.¹⁴⁶ Moreover, certain legislative enactments may be suspended by war:

¹⁴⁵ *Collins v Smith* (Pa.) 6 Whart. 294.

¹⁴⁶ *Halfin v State*, 5 Tex. Ap. 212.

"But in *Hanger v Abbott*, 6 Wall. 532, 18 L.Ed. 939, it was ruled, after grave consideration, that the time during which the courts of the recently rebellious States were closed to the citizens of other States, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by statutes of limitation, within which only suits may be brought, and this, though the statutes contain no such exception. In other words, it was held that the statutes of limitations of the insurrectionary States were suspended, while the courts in those states were closed by war. Similar decisions have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue".¹⁴⁷

Similarly, the enactment of legislation by the federal government may suspend state legislation upon certain subjects. This is true with reference to those matters upon which both may legislate. Consequently, as Marshall, C. J., said:

" . . . until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contains no principle which violates the tenth section of the first article of the constitution of the United States".¹⁴⁸

For, if there is a state law on the subject, the subsequent passage of a bankrupt law by congress neither repeals nor annuls it; it only suspends its operation so far as the law of the state may be in conflict with the act of Congress; and as a result, proceedings commenced under the state law prior to the passage of the federal act may be carried on to their final determination in accordance with the provisions of the state law.

"It follows from these decisions that a state insolvent law is not unconstitutional, and that it is neither repealed, annulled nor rendered void by the passage of the bankrupt law, for proceedings commenced under its provisions, may be completed, notwithstanding the existence of a bankrupt law enacted after their commencement, and because the moment the act of congress is repealed the state law at once revives. It is evident, therefore, that the state law has vitality notwithstanding and

¹⁴⁷ *Braun v Sauerwein* (U.S.) 10 Wall. 218, 19 L.Ed. 895. Also see *Karnuth v U.S.*, 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677.

¹⁴⁸ *Sturges v Crowninshield* (U.S.) 4 Wheat. 122, 4 L.Ed. 529.

during the existence of the paramount law of the United States, for if it was void by the act of congress it could not revive.

"We now come to the question whether the state can pass an insolvent or bankrupt law during the existence of an act of congress on the subject. . . .

"No constitutional provision has been violated, for the passage of such a law is not merely not prohibited, but it is impliedly sanctioned by the clause giving congress power over the subject matter of bankruptcies. The legislature may pass a law to take effect instantly, or at a future day, or on the happening of a future event. If the statute had said that it was to take effect upon and after the repeal of the bankrupt law of congress, there could have been no doubt as to its validity. But such is the precise effect of the law without the insertion of any such provision. The act of congress is the paramount law on the subject when called into action. The law of the state is subordinate to it. The efficient action of the state law is suspended for the time being precisely as in the cases already considered, when a national bankrupt law was passed subsequently to a state law on the same subject. The state may pass a law which is subordinate to the paramount authority of national legislation, and is only subordinate to that, but which, when that ceases to have force by reason of its repeal, has at once the vigor of law. Whether the law of the state is existent and superseded by the subsequent legislation of congress, or is inoperative by reason of precedent congressional action, can make no difference. In either case the efficiency of the state law is alike suspended and in abeyance while the act of congress is in force, and when that is repealed the law of the state at once and instantly becomes operative, and action may be had under its provisions.

"It is urged that the law was invalid because it did not go into complete operation after its passage. But that is not requisite to its validity. It does go into partial operation on its passage. It was a law valid in all respects and to be obeyed, except so far as it was in conflict with the statute of the United States. When that conflict ceased, the law went into full operation. It was a law, to go into full effect when it ceased to be in conflict with the act of congress, and whether that was inserted in the act, or left as the legal result from the relation of the state and national government to each other, can make no difference."¹⁴⁹

This view is not only applicable to bankruptcy laws but also to other subjects not within the exclusive realm of federal legislation.¹⁵⁰

¹⁴⁹ Appeal of Damon, 70 Me. 153.

¹⁵⁰ State v Lord, 66 N.H. 479, 29 Atl. 556 (sale of liquor).

Legislation may be repealed by non-user, or, more accurately, by desuetude.¹⁵¹ This subject has been discussed elsewhere and therefore will not be treated further at this point, except to say that the authorities are not in harmony. While it would seem that long and continued violation of a statute or disregard of its terms by the people generally or acquiesced in by them, should operate as a repeal of the statute by the direct exercise of the legislative power by the people, or at least, as the implied repeal of such statute by virtue of custom arising to the status of a rule of the common law, a recent case refuses to recognize a repeal by this method largely, if not entirely, on the ground that the courts cannot make the law but are confined to its interpretation.¹⁵² Since the construction placed upon a statute by the people may determine the construction which will be accepted by the courts, it is difficult to see any real objection to proceeding a step further and recognizing the complete abrogation of a statute by the conduct of the people from whom the statute originally owes its life.

¹⁵¹ See § 133, *supra*.

¹⁵² "It may be urged that social intercourse, and personal, professional, and business relationships, have so changed within the past 53 years that the law promulgated in 1885 has become obsolete; that it should be treated as a dead letter decreed by custom and modern convenience to be a relic of other days. Answer to this argument is that courts are interpreters, and not makers of the law." *McKeown v State* (Ark.) 124 S.W. (2) 19.

CHAPTER XXIX
CONSTRUCTION OF CODES, REVISIONS,
AND COMPILATIONS

- § 324. In General.
§ 325. Construction as a Whole—Conflicting Provisions.
§ 326. Repeal by Codification and Revision.
§ 327. Retroactive Construction.

§ 324. In General.¹—A code is simply a part of the statutory law and has no higher standing or sanctity than an ordinary statute.² Like many other legislative enactments, a code or revision should be subjected to a liberal construction,³ in order to promote the objects for which it was enacted⁴ — to clarify existing statutes — although the liberality of construction should not be extended so far as to annul any of the code's provisions or to defeat the intention of the legislature as revealed in any particular section or portion thereof.⁵

In seeking the legislative intent in any code provision, the court may look into the history of the legislation on the subject under consideration; it may consider the conditions and circumstances which led the legislature to enact the particular provision, and examine prior as well as contemporaneous legislation on the same

¹ For definitions and enactment, see *supra*, Chapter XIII. For additional treatment of their construction, see Statutes, 59 Corpus Juris, §§ 645-652.

² *Los Angeles County v Payne* (Calif.) 66 Pac. (2) 658.

³ *State v District Court*, 38 Mont. 119, 99 Pac. 139; *State v Superior Court*, 52 Wash. 13, 100 Pac. 155. This sort of construction is some times required by provisions in the code or revision. *People v Sota*, 49 Calif. 67; *Hyatt v Anderson* (Ky.) 74 S.W. 1094; *Arthaud v Griffin*, 205 Iowa 141, 217 N.W. 809.

⁴ *Grannis v San Francisco Super. Court*, 146 Calif. 245, 79 Pac. 891; *Wakenva Coal Co. v Johnson*, 234 Ky. 558, 28 S.W. (2) 737. Also see *Wright v Oakley* (Mass.) 5 Metc. 400.

⁵ *State v District Court*, 38 Mont. 119, 99 Pac. 139. And see *State ex rel. Gates v Comrs. of Public Lands*, 106 Wis. 584, 82 N.W. 549, where special laws were not repealed by a revision which was limited to general laws.

subject.⁶ Of course, the provisions of the revision or code should first be examined in order to ascertain their meaning, but where the language is ambiguous and uncertain,⁷ the original statutes,⁸ as well as those in *pari materia*,⁹ may be resorted to for assistance in seeking the legislative intent.¹⁰ As the court stated in *Cummings v Everett* (82 Me. 260, 19 Atl. 456) :

"Of course, the whole chapter should be studied; but it should be borne in mind that, though technically enacted together, the different sections and clauses were first enacted independently, at different times, under different circumstances, and for different purposes. In our efforts to ascertain the meaning of any section or clause, we should resort to the original statute from which it was condensed, and search for the legislative intent in the words of the statute, and also in its occasion and purpose, and in the jurisprudence of the time.

"Moreover, the whole body of previous and contemporaneous legislation should be considered in interpreting any statute. The legislative department is supposed to have a con-

⁶ *Hamilton v Rathbone*, 175 U.S. 414, 20 S.Ct. 155, 44 L.Ed. 219; *Granins v San Francisco Super. Ct.*, 146 Calif. 245, 79 Pac. 891; *Junkin v Knapp*, 205 Iowa 184, 217 N.W. 834; *Chicago etc. Ry. Co. v Nichols*, 130 Kan. 509, 287 Pac. 262; *Cummings v Everett*, 82 Me. 260, 19 Atl. 456; *In re Ahlers*, 127 N.Y.S. 61, 141 Ap. Div. 891, *aff'd* 201 N.Y. 592, 95 N.E. 1122. And the fact that the laws re-enacted in the revision were originally passed at different sessions, does not preclude resort to the history of the legislation. *Chicago etc. R. Co. v Nichols*, 130 Kan. 509, 287 Pac. 262.

⁷ *Merchants Nat. Bank v U.S.*, 42 Ct. Cl. 6; *Hamilton v Rathbone*, 175 U.S. 414, 20 S.Ct. 155, 44 L.Ed. 219; *Heck v State*, 44 Ohio St. 536, 9 N.E. 305; *Marqua v Martin*, 109 Ohio St. 56, 141 N.E. 654.

⁸ *Bate Refrigerating Co. v Sulzberger*, 157 U.S. 1, 15 S.Ct. 508, 39 L.Ed. 601; *State v Smith*, 188 Ala. 432, 66 So. 61; *Comer v State*, 103 Ga. 69, 29 S.E. 501; *Libby v Pelham*, 30 Idaho 614, 166 Pac. 575; *Hooper v Creager*, 84 Md. 195, 35 Atl. 967, 36 Atl. 359, 35 L.R.A. 202; *Pratt v Street Commissioners*, 139 Mass. 559, 2 N.E. 675; *Becklin v Becklin*, 99 Minn. 307, 109 N.W. 243; *Pierce City v Hentschel (Mo.)* 201 S.W. 31; *People v Stevens*, 109 N.Y. 159, 16 N.E. 53; *Fort v Noe*, 144 Tenn. 337, 233 S.W. 516; *Zurich Gen. etc. Ins. Co. v Walker (Tex. Com. Ap.)* 35 S.W. (2) 115; *Gaines' Admr. v Marye*, 94 Va. 225, 26 S.E. 511. The original acts should be referred to only in case of ambiguity, since the revision constitutes the law. *Young v Young (Tex.)* 41 S.W. (2) 367. Also see *States v Bowen*, 100 U.S. 508, 25 L.Ed. 631. And in case of conflict between the code or revision and the original act, the latter will control. See *State v Purcell*, 39 Idaho 642, 228 Pac. 796.

⁹ See *Rex v Abrahams (Eng.)* 2 K.B. 859.

¹⁰ Note, particularly, *Central of Ga. Ry. Co. v State*, 104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518.

sistent design and policy, and to intend nothing inconsistent or incongruous."

Accordingly, where there is ambiguity in the revised statutes, it should be construed as expressing the law as it was prior to the revision,¹¹ unless the court finds a clear intention to alter the old law.¹²

Furthermore, the judicial construction of a statute later incorporated in a codification or revision may be referred to for assistance,¹³ since the court's interpretation of the law under such circumstances, by adoption, becomes a part of the code or revision.¹⁴

Even a change in the language or phraseology of a statute included in a codification or revision will not, as a general rule, alter the law,¹⁵ unless the change be so material or radical as to indicate an intention on the part of the legislature to modify the law,¹⁶ or unless the intention to change clearly appears from the language of the revised statute,^{16a} and especially when considered in connection with the subject matter and the legislative history.¹⁷

"When a statute is incorporated in a general revision of all the statutes, and re-enacted along with the re-enactment of other statutes, its purpose and effect are not changed, unless there be some compelling change in the language. Usually, a revision of the statutes simply iterates the former declaration

¹¹ *Oconto Co. v Town of Townsend* (Wis.) 244 N.W. 761.

¹² *Penola v Davis* (Pa.) 161 Atl. 567.

¹³ *Walsh Construction Co. v City*, 271 Fed. 701, *affd.* 279 Fed. 57; *Hurt v Knox*, 220 Ala. 448, 126 So. 110; *People v Ellis*, 204 Calif. 39, 266 Pac. 518; *Foster v Curtis*, 213 Mass. 79, 99 N.E. 961; *Ex parte Carey*, 306 Mo. 287, 267 S.W. 806; *Ackerman v Marable* (Tenn.) 95 S.W. (2) 1286; *Draper v Common.*, 132 Va. 494, 49 S.E. 643; *Smith v Smith*, 19 Wis. 522.

¹⁴ *Allen v Allen* (Ala.) 135 So. 169.

¹⁵ *McDonald v Hovey*, 110 U.S. 619, 4 S.Ct. 142, 28 L.Ed. 269; *Mackey v Miller*, 126 Fed. 161; *Neiss v Burwen* (Mass.) 191 N.E. 654; *Becklin v Becklin*, 99 Minn. 307, 109 N.W. 243; *Champ v Brown* (Minn.) 266 N.W. 94; *Strottman v St. Louis, etc., R. Co.*, 211 Mo. 227, 109 S.W. 243; *Stearns v Graham*, 83 Vt. 111, 74 Atl. 486.

^{16a} *Norfolk & Portsmouth Bar Assoc. v Drewry*, 161 Va. 833, 172 S.E. 282.

¹⁶ *Conger v Barker's Admr.*, 11 Ohio St. 1. Also see *Martin v Oskaloosa*, 126 Iowa 680, 102 N.W. 592. This is equally true where the statute included in the code or revision has been judicially construed before its incorporation, for there is a presumption that the legislature intended to continue the judicial construction. *Evans v State*, 165 Ind. 369, 75 N.E. 651; *Shelton v Sears*, 187 Mass. 455, 73 N.E. 666; *Scheffels v Tarbert*, 46 Wis. 439.

¹⁷ *Champ v Brown* (Minn.) 266 N.W. 94.

of legislative will." *Cummings v Everett*, 82 Me. 260, 19 Atl. 456.

In fact, the court will presume that the legal effect of a consolidation and restatement is the same as that of the old statutes.¹⁸ Consequently, the revisors are presumed not to have changed the law, if the language which they have used fairly admits of a construction making it consistent with the old law.¹⁹ But if a new or different meaning is revealed, it must be given effect by the court.²⁰ In this connection, however, it should be kept in mind that there is also a presumption that the omission of matter found in the old code from the new code, is the result of an attempt on the part of the legislature to simplify the language without changing its meaning.²¹ In the words of Chancellor Kent, as quoted in *Mackey v Miller* (126 Fed. 161), "the change in phraseology in the language of a revised act shall not be deemed a change of the law as it stood before the revision, unless such phraseology evidently purported an intention in the Legislature to work a change." Such an intent may be indicated by radically different language, by additions to, as well as omissions from the former language.

Assistance in ascertaining the meaning of an uncertain or ambiguous provision in a code or revision may also be found in the notes,²² and the reports²³ of the commission which drafted the new

¹⁸ *Mutual Ben. Health & Acc. Assn. v Neale* (Ariz.) 33 Pac. (2) 604. Also see *Norfolk & Portsmouth Bar Assn. v Dewey* (Va.) 172 S.E. 282.

¹⁹ *Starck v Kreyling* (Ind.) 181 N.E. 165.

²⁰ *Champ v Brown* (Minn.) 266 N.W. 94; *McNeely v State*, 50 Tex. Cr. R. 279, 96 S.W. 1083; *State ex rel. Porter v Ritchie*, 32 Utah 381, 91 Pac. 24.

²¹ *Castaneda v Nat. Cash Register Co.* (Ariz.) 29 Pac. (2) 730. Consequently, the court should not supply missing words. *Saslow v Previti* (N.J.) 3 Atl. (2) 811.

²² *Mackey v Miller*, 126 Fed. 161; *Manice v Manice*, 43 N.Y. 303; *Pfingsten v Pfingsten*, 164 Wis. 308. Also see *Knowlton v Moore*, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969, where the headings of a revised statute were properly considered; and to same effect, see *Barnes v Jones*, 51 Calif. 303, and *People v Molyneus*, 40 N.Y. 113.

²³ *Byfield v Newton*, 247 Mass. 46, 141 N.E. 658; *Wipperman Mercantile Co. v Jacobsen*, 133 Minn. 326. Also see *In re Burnstein's Estate*, 275 N.Y. S. 601, 153 Misc. 515, where observations of a commission selected to investigate defects in the law, were resorted to for assistance in ascertaining the legislative intent. And, obviously, the report of a committee appointed to codify the law on a given subject is entitled to weight, where the legislature enacts the law in the exact language of the commission's draft. *In re Tarlo's Estate*, 315 Pa. 321, 179 Atl. 139.

enactment, although the construction of such a commission thus revealed, is not a controlling consideration.²⁴ It may, however, in some instances, be imputed to the legislature, as, for example, where the legislature by adopting a marginal note limiting the scope of a statute to acts done in resistance of revenue officers, thereby affirms its purpose not to amend or change the original legislation.²⁵

The legitimate status of acts incorporated into a revision is not necessarily clear. Is it always proper to refer to the original acts in order to show the legislative intent, or is such action proper only in certain instances? The correct answer seems to be expressed in *Hamilton v Rathbone* (175 U. S. 414, 20 S.Ct. 155, 44 L.Ed. 219):

"The decisive question then is whether section 728 is to be construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in such prior act. The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . .

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word 'property', used in section 728, includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another. The main object of the revision was to incorporate all the existing statutes in

²⁴ *Tennant v Kuhlemeier*, 142 Iowa 241, 120 N.W. 689; *Salmon v Central Trust Bank*, 157 Minn. 369, 196 N.W. 468; *People v Conroy*, 97 N.Y. 62.

²⁵ *Mackey v Miller*, 126 Fed. 161. Also see *In re Quenzer's Estate*, 274 N.Y. S. 113, 152 Misc. 796.

a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

Further assistance may be found from the arrangement of the various divisions of the code, since arrangement may, in many instances, be indicative of the intention of the legislature.²⁶ But arrangement or position will not necessarily control the construction,²⁷ particularly where a clearly expressed meaning exists,²⁸ since sections relating to each other or to the same subject are not always grouped together or arranged in any logical order.²⁹ Similarly, a statute found in one chapter may be removed and placed into another chapter without any change in its meaning.³⁰ And where a compilation is involved, the reparagraphing of the sections definitely does not affect the construction previously placed thereon.³¹ Chapter and section headings should also be considered in interpreting the sections of a code, and they should be given effect according to their import as though they were included in the body of the law.³²

²⁶ *Haydon v Normandin*, 55 Mont. 539, 179 Pac. 460.

²⁷ *Weatherly v Capital City Water Co.*, 115 Ala. 156, 22 So. 140; *Battle v Shivers*, 39 Ga. 405; *John v Sebattis*, 69 Me. 473; *In re Murphy*, 23 N.J. L. 180.

²⁸ *Tillman v Tillman*, 84 S.C. 552, 66 S.E. 1049.

²⁹ *Hatchett v Billingslea*, 65 Ala. 16; *Weatherly v Capital City Water Co.*, 115 Ala. 156, 22 So. 140; *John v Sebattis*, 69 Me. 473; *Hooper v Creager*, 84 Md. 195, 35 Atl. 967, 36 Atl. 359, 35 L.R.A. 202.

³⁰ *Craig v Gaddis (Miss.)* 157 So. 684, 95 A.L.R. 1494.

³¹ *United Pacific Ins. Co. v Baker (Idaho)* 67 Pac. (2) 1024.

³² *Gonzales v Superior Court (Calif.)* 44 Pac. (2) 320; *In re Forthmann's Estate*, 118 Calif. Ap. 332, 5 Pac. (2) 472. Also see *Hutchinson v Montgomery (Tenn.)* 112 S.W. (2) 827, that even original caption borne by an act carried into a code, may be considered.

§ 325. **Construction as a Whole—Conflicting Provisions.**—A code or revision should be construed as a whole.³³ In other words, a code enacted as a single comprehensive statute, is to be considered as such,³⁴ and not as a series of disconnected articles or statutes.³⁵ Thus, the sections of a code defining separate and community property must be construed together.³⁶ The court should consider every provision,³⁷ and the various provisions should be construed together,³⁸ irrespective of the time of the passage of the

³³ *Weatherly v Capital City Water Co.*, 115 Ala. 156, 22 So. 140; *Congdon v Butte Consolidated Ry. Co.*, 17 Mont. 481, 43 Pac. 629; *Edwards v Sorrell*, 150 N.C. 712, 64 S.E. 898; *City of Cincinnati v Guckenberger*, 60 Ohio St. 353, 54 N.E. 376; *First Nat. Bank v Holland*, 99 Va. 495, 39 S.E. 126, 55 L.R.A. 155. This construction is required because a code or revision is composed of many statutes with different origins re-enacted simultaneously. *State v McGuire*, 84 Conn. 470, 80 Atl. 761; *Common. v Goding*, 3 Metc. (Mass.) 130; *Bryant v Livermore*, 20 Minn. 313; *Shepherd v F. J. Kress Box Co. (Va.)* 153 S.E. 649. And note *Moore v Downham (Va.)* 184 S.E. 199, that related sections of a code should be construed together. To same effect, see *Hunt v Hunt*, 172 Miss. 732, 161 So. 119. But, an act added to the code afterwards, should not be construed as if it were a part of the code, although it may be considered with those provisions in *pari materia*. *Rayford v Faulk*, 154 Ala. 285, 45 So. 714. Also see *supra*, § 180.

³⁴ *Bagley v Forrester*, 53 Fed. (2) 831. "The provisions of the code . . . are to be construed with relation to each other as though all . . . had been passed at the same moment of time and were parts of the same statute." *Ex parte Goddard (Calif.)* 74 Pac. (2) 818, 823.

³⁵ *Lighting Fixture Supply Co. v Fidelity Union Fire Ins. Co.*, 55 Fed. (2) 110.

³⁶ *Hiatt v Seyster (Calif.)* 10 Pac. (2) 473.

³⁷ *Morgan v Perry County (Ark.)* 37 S.W. (2) 74; *Pacific Indemnity Co. v Myers*, 211 Calif. 635, 296 Pac. 1084; *Bigelow v Saylor (Iowa)* 228 N.W. 279; *Kakenva Coal Co. v Johnson (Ky.)* 28 S.W. (2) 737; *State ex rel. McClanahan v DeWitt*, 160 Mo. Ap. 304, 142 S.W. 366; *Looft v Lawton*, 97 N.Y. 478; *Latham v Latham*, 178 N.C. 12, 100 S.E. 131; *Pacific Spruce Corp. v Oregon Portland Cement Co.*, 133 Ore. 223, 286 Pac. 520, 289 Pac. 489; *Hechler's Exr. v Kemp*, 122 Va. 528, 95 S.E. 400. Even the title of a section should be considered. In *re Forthmann's Estate (Calif.)* 5 Pac. (2) 472.

³⁸ *Russell v Roberts*, 54 Ohio App. 441, 7 N.E. (2) 811. Also see *Wakenova Coal Co. v Johnson*, 234 Ky. 558, 28 S.W. (2) 737, that the various sections of a revision must be read together and liberally construed to promote the purpose of the revision. Sections of the code in *pari materia* should all the more be construed together in the event of ambiguity. *Meyers v City of Idaho Falls*, 52 Idaho 81, 11 Pac. (2) 626, and *Brown v Bozeman*, 138 Calif. Ap. 133, 32 Pac. (2) 168.

various sections.³⁹ It should seek to harmonize the several provisions⁴⁰ and to give each full effect.⁴¹ In the event, however, that certain provisions are irreconcilable, the one last enacted or adopted will prevail, by virtue of the assumption that it is the last expression of the legislative will or intent.⁴² Consequently, in instances of this character, the problem is presented to the court to determine which of the inconsistent provisions is actually the later of the two. Several interesting angles are presented, the most important of which are treated in *Gibbons v Brittenum*:⁴³

“Those sections which give the widow half the estate were adopted nearly a month after section 1788, and are the latest expressions of the legislative will, and must prevail, unless there is something peculiar or exceptional in the Code, which would demand a departure from the general rule.

“It is said that the Code was adopted by the Legislature *uno flatu*, and speaks with a simultaneous voice in all of its provisions. That is true in the same sense and to the same extent of any ordinary statute consisting of several sections enacting the law on a particular subject. The act, as a whole, is put to the vote of the respective houses of the Legislature; if it receives a majority of the voices, it has passed (as we say); and when that fact is certified to the governor, he approves it as a

³⁹ *People v Snider Packing Corp.*, 259 N.Y.S. 305, 144 Misc. 654.

⁴⁰ *Barth v Ely*, 85 Mont. 310, 278 Pac. 1002; *In re McMullen*, 148 N.Y.S. 1092, 85 Misc. 661; *Latham v Latham*, 178 N.C. 12, 100 S.E. 131; *Hoffman v Pounds*, 36 Ohio Ap. 492, 173 N.E. 622; *Harmdierks v Smith (S.D.)* 227 N.W. 845; *First Security Loan Co. v Englehart*, 107 Wash. 86, 181 Pac. 13. But note *In re Petition of Borough of Clarion*, 77 Pa. Super. 429. Also see *Item Co. v Nu Grape Bottling Co.*, 160 La. 975, 107 So. 77, where the articles of the Civil Code were held subordinate to those of the Code of Practice, on account of conflict.

⁴¹ *In re Allen's Estate*, 307 Mo. 674, 271 S.W. 755; *State v Daugherty*, 47 Nev. 415, 224 Pac. 615; *In re Ahlers*, 127 N.Y.S. 61, 141 Ap. Div. 891; *Smith v Blackford (S.D.)* 228 N.W. 466. If irreconcilable, the latter one will control. *Hopkins v Superior Ct.*, 105 Calif. 133, 286 Pac. 1053.

⁴² *Building Supplies Corp. v Willcox*, 284 Fed. 113; *State v Hennepin County Dist. Court*, 107 Minn. 437, 120 N.W. 894; *Gibbons v Brittenum*, 56 Miss. 232; *Parker-Young Co. v State (N.H.)* 145 Atl. 786. That the positions of the conflicting sections are immaterial, see *Hillsborough County Comrs. v Jackson*, 58 Fla. 210, 50 So. 423. And the burden of showing irreconcilability and the date of adoption is on the person claiming repugnancy. *Gee v Thompson*, 11 La. Ann. 657.

⁴³ *Gibbons v Brittenum*, 56 Miss. 232. Also see *State ex rel. Attorney Gen. v Heidorn*, 74 Mo. 410; *Gaines Admr. v Marye*, 94 Va. 225, 26 S.E. 511. But note *In re Richards*, 96 Fed. 935; *U.S. v Updike*, 25 Fed. (2) 746; *Brown v County Comrs.*, 21 Pa. 37.

whole, and it becomes law. And yet, if we find a later section in such act repugnant to a former one, the later must be accepted as repealing the former.

“A statute is the will of the law-making power, in the same sense that a testament is the will of a testator. The latest declaration must be accepted as the final intention and purpose.

“If we could regard the Code (for the purposes of considering the point) as one statute, and that the mind of the Legislature was expressed in the order in which the several sections are enumerated, then the conclusion would be inevitable that a later section, irreconcilable with a former one, would, by necessary implication, repeal it. But an analysis of the first chapter, providing for its adoption and publication, in connection with the enrolled bills, makes it impossible to apply that rule in its construction. The chapters, as published, are not numbered as they were passed by the Legislature. As adopted, each chapter contained sections numbered from one on, consecutively to the end of the Code. This change in the order of the enactment of the chapters and enumeration of the sections was brought about by the eleventh section of the first chapter, which conferred power on the commissioner who should be designated to supervise the publication of the Code, ‘to rearrange the chapters by numbers, and to remodel the sections, numbering them from one, consecutively, through the volume. * * * He shall omit the enacting and enforcing clauses to all the chapters and sections.’

“It is plain that no more was intended by this eleventh section than to intrust to the judgment and discretion of the commissioner the rearrangement of the chapters and sections, without regard to the order of time in which they were severally enacted; and the order in which we may find particular sections placed affords no test or guide of whether one is an earlier or later expression of the legislative will on the subject.

“But if there be in the Code, as published, or in the enrolled chapters in the secretary of state’s office, other clear and conclusive evidence, proper and competent to be consulted, as to the time when particular conflicting provisions were enacted, it is the duty of the court to consult it. The date of an act of the Legislature is the time when the governor approved it.

“We know, from an inspection of the published volume, that each chapter of the Code was passed by the two houses and approved by the governor as ‘separate acts.’ When the sixty-six chapters (which compose the Code) had been thus passed and approved, they had force and effect as laws, without anything more. The eleventh section of the first chapter, as already remarked, had the single object in view of an orderly

arrangement and publication. There is this curious anomaly: The first section of the first chapter declares that the Code shall consist of that chapter 'and the following entitled chapters, to-wit.' Then follows an enumeration of sixty-one; whereas the Code, as published and as adopted by the Legislature, contains sixty-six chapters—five more than those enumerated. These five additional chapters were 'respectively approved,' May 13th, April 22d, May 3d, 10th and 12th, and are undoubtedly of equal force with the sixty-one named in the first chapter.

"The final section of the several chapters, is 'that this act shall take effect on the first day of October, 1871,' so that, without the aid of the eighth section of the first chapter, the time of going into effect was fixed.

"From this review of the mode and order of adopting the statutes, arranged into chapters according to the subjects, each chapter separately considered by the two houses, adopted by them, and approved by the governor, we must construe this entire legislation as passed at the same session, and if one part is irreconcilably inconsistent with another, give effect to that which last had the sanction and consent of the lawmaker. As we have seen, the last section of a single act prevails over a prior one, though the act as a whole was approved on its final passage through the senate and House of Representatives, and approved as a whole by the governor; because the courts must assume that in construing and arranging the plan of the act, the legislative mind expressed its ultimate purpose in the later section. In such case, the courts lay hold of the numerical order of the parts of the law as the test.

"We have seen, also, that the same rule obtains in the construction of a code, where its materials are built up in consecutive order and arrangement.

"But the Code of 1871 furnishes incontestible evidence that the various subjects were considered in separate acts, called chapters, and that each subject and chapter received legislative sanction on a particular day; and there is, therefore, no difficulty in determining the precise day when a particular part of the Code was adopted. If that can be ascertained, we must declare that the enactment of a later day annuls the inconsistent enactment of a former day.

"It follows, then, that those sections which give the widow one-half of her husband's estate, when there are no children, or descendants of them, having been adopted by the Legislature twenty or more days after the section which gave her all, must be construed as a repeal of the older and prior section by implication."

Moreover, a special provision will usually prevail over a general one,⁴⁴ and definitions must give way to positive enactments.⁴⁵

§ 326. Repeal by Codification and Revision.—Of course, a complete revision of a statute may under certain conditions operate as a repeal. For instance, where the revision is obviously intended to be a substitute for the old law and covers the entire subject matter of the old law, a repeal will take place.⁴⁶ In fact, if the entire subject matter is covered by the revision, that fact in and of itself indicates the legislative intent to repeal the former law.⁴⁷ Under these circumstances, as in the case of repeals generally,⁴⁸ the old and new law do not need to be inconsistent.⁴⁹ Nor is it necessary that the revision contain any language expressly abrogating pre-existing law.⁵⁰ The repeal would seem to take place by implication,⁵¹ although in some jurisdictions a contrary view is adopted.⁵² In either case, however, the repeal takes place because of the legislative intent to make a substitution,⁵³ and without this intent no repeal will occur.⁵⁴

⁴⁴ In re Sayer's Estate, 203 Calif. 753, 265 Pac. 924; *Tousley v Dishman*, 90 Calif. Ap. 759, 266 Pac. 373; *Mutual Electric Co. v Pomeroy*, 99 Ohio St. 75, 124 N.E. 58.

⁴⁵ *Cali v National Linen Serv. Corp.*, 38 Fed. (2) 35.

⁴⁶ *Dillion v Bicknell*, 116 Calif. 111, 47 Pac. 937; *People v Borgeson*, 335 Ill. 136, 166 N.E. 451; *Goodenow v Buttrick*, 7 Mass. 140; *Poindexter v Pettis County*, 295 Mo. 629, 246 S.W. 38; *People ex rel. Shipston v Thompson*, 187 N.Y.S. 395; *Garr v Fuls*, 286 Pa. 137, 133 Atl. 150; *Melton v State*, 160 Tenn. 273, 23 S.W. (2) 662.

⁴⁷ *State v Peverly*, 32 Dela. 443, 125 Atl. 421. Also see *Potter v Merchants' Trust Co.*, 246 Mich. 456, 224 N.W. 624.

⁴⁸ See *supra*, § 312.

⁴⁹ *People v Borgeson*, 335 Ill. 136, 166 N.E. 451; *State v Michaels*, 103 W.Va. 634, 138 S.E. 199.

⁵⁰ *People v Borgeson*, 335 Ill. 136, 166 N.E. 451; *Garr v Fuls*, 286 Pa. 137, 133 Atl. 150; *Madison v So. Wisconsin R. Co.*, 156 Wis. 352, 146 N.W. 492, 10 A.L.R. 910.

⁵¹ *Pulaski County v Downer*, 10 Ark. 588; *State v Rose*, 97 Fla. 710, 122 So. 225; *People v Borgeson*, 335 Ill. 136, 166 N.E. 451; *Nash v State (Ind.)* 166 N.E. 451; *Gill v Goldfield Cons. Mines Co.*, 43 Nev. 1, 176 Pac. 784, 184 Pac. 309; *Nowata Board of Educ. v McCracken*, 62 Okla. 173, 162 Pac. 782.

⁵² At least, this view seems to be taken in Illinois. *Northern Trust Co. v Chicago R. Co.*, 318 Ill. 402, 149 N.E. 422, rev. 232 Ill. Ap. 246.

⁵³ See cases under note 46, *supra*.

⁵⁴ *Mayer v McLaughlin*, 80 N.J. Eq. 342, 84 Atl. 1054; *Litchfield v Roper*, 192 N.C. 202, 134 S.E. 651.

As we have indicated above, the portions of the old law which are omitted from the revision will be repealed, provided the revision is clearly intended to cover the subject matter of the old law.⁵⁵ Conversely, every part of the old law which is retained in the revision continues in effect.⁵⁶

As is true with reference to revisions, a code will likewise operate as a repeal of pre-existing law, where the former covers the entire subject matter of the latter and is clearly intended by the lawmakers to be a substitute for the old law.⁵⁷ But besides that, a code will also repeal a previous law with which it is repugnant or irreconcilably inconsistent.⁵⁸ In other words, a code will operate to repeal pre-existing law by implication in the same way as implied repeals generally take place.⁵⁹ And in at least one state, the omission of any matter covered in the old law will operate as a repeal of such matter.⁶⁰ Of course, this result may be justified by reasoning that the omission indicates the legislative intent that such matters shall no longer be the law.⁶¹

So far as repeals by implication are concerned, there is one important difference or distinction that should be kept in mind that sets off repeals occurring in this manner by virtue of revisions from those occurring by the enactment of subsequent statutes. This is pointed out and the reason given by the court in *Saslow v Previti* (17 N.J. Misc. 29, 3 Atl. (2) 811):

⁵⁵ *Hardy v State*, 25 Ga. Ap. 287, 103 S.E. 267; *Boyd v Smith*, 200 Iowa 687, 205 N.W. 522, 43 A.L.R. 1381; *State v Smiley*, 317 Mo. 1283, 300 S.W. 459; *Briggs v Buckner* (Tex.) 19 S.W. (2) 190.

⁵⁶ *Chicago v Foley*, 335 Ill. 584, 167 N.E. 779. "Where a statute expressly repeals specific acts, there is a presumption that it was not intended to repeal others not specified." *State Board of Law Exam. v Brown* (Wyo.) 77 Pac. (2) 626.

⁵⁷ *State v Miller*, 52 Mont. 562, 160 Pac. 513; *Litchfield v Roper*, 192 N.C. 202, 134 S.E. 651; *Ripey v Art Wall Paper Mill*, 27 Okla. 600, 112 Pac. 1119.

⁵⁸ *Roassco v Tuolumne County*, 143 Calif. 430, 77 Pac. 148; *Georgia R., etc., Co. v Wright*, 124 Ga. 596, 53 S.E. 251; *Litchfield v Roper*, 192 N.C. 202, 134 S.E. 651.

⁵⁹ For implied repeals generally, see *supra*, §§ 137, 311-312.

⁶⁰ *Palmetto Lumber Co. v Southern Ry.*, 154 S.C. 129, 151 S.E. 279. Also see *Cochran v Lanfair*, 139 Ga. 249, 77 S.E. 95.

⁶¹ *Guilford & Sangerville Water Dist. v Sangerville Water Supply Co.*, 130 Me. 217, 154 Atl. 567.

"It is true that repeal by implication is not favored and such is less readily implied in the case of a revision than in the case of a subsequent statute which appears to embrace the subject matter of the earlier act. Usually a revision of the statute simply iterates the former declaration of the legislative will."

As a result, because of the basic purpose of the revision, an intent to repeal should clearly exist before a repeal of pre-existing law is considered as taking place. Any other view would destroy or hide the real purpose behind the revision of statutes—to clarify existing law.

Frequently, the repealing effect of a code or revision may be partially or entirely taken away by use of saving clauses.⁶² While such a clause may not completely free the revision or code from its ability to abrogate pre-existing laws by implication, it is nevertheless an important consideration.⁶³ Moreover, a revision or code may expressly state that it is intended to repeal certain laws. Naturally, this will limit the scope and extent of repeals by implication.⁶⁴

§ 327. Retroactive Construction.⁶⁵—If an existing statute is included in a revision or codification without change, or, at least without a substantial change,⁶⁶ in its language, its effectiveness as law continues unbroken from the time of its original enactment.⁶⁷ On the other hand, where the law is altered by the code or revision, the problem of retroactive operation appears. If for no other reason than for the sake of harmony, it would seem desirable that this problem be solved by the application of the principles hereto-

⁶² *State v Cantwell*, 142 N.C. 604, 55 S.E. 820; *Haralson v Suzuki* (Tex.) 300 S.W. 190.

⁶³ *Burnham v Onderdonk*, 41 N.Y. 425.

⁶⁴ *Holden v Minnesota*, 137 U.S. 483, 34 L.Ed. 734, 11 S.Ct. 143; *In re Simmons*, 248 Mich. 297, 226 N.W. 907; *Ruge v Gallagher*, 49 N.Y.S. 729, 22 Misc. 572.

⁶⁵ For Retroactive Construction generally, see Chapter XXV, *supra*.

⁶⁶ *San Joaquin, etc., Irr. Co. v Stevinson*, 164 Calif. 221, 128 Pac. 924.

⁶⁷ *Stafford v His Creditors*, 11 La. Ann. 470; *Wright v Oakley*, 5 Metc. (Mass.) 400. "Where a statute or section of the Code is amended merely by adding to or taking therefrom, the portion carried forward in the new law is not a new law, but has been the law since the beginning." *State ex rel. State Board v Jacobson* (Mont.) 86 Pac. (2) 9. And see *Fairchild v Masonic Hall Assn.*, 71 Mo. 526, for effective date of a revision.

fore discussed pertaining to the retroactive effect of statutes generally. But provisions are sometimes included in codes and revisions to the effect that they shall be construed as continuations of the statutes therein included.⁶⁸ In this situation, the problem nevertheless continues, although the cases seem to indicate, as a general rule that no retroactive effect shall be given to provisions altered by the code or revision.⁶⁹ At least, so far as revisions are concerned, in addition to the usual reasons applicable to statutes generally,⁷⁰ which are of course equally applicable to revisions and codes, there is a further reason for construing them prospectively. This reason is to be found in the very object of revisions.

“The object, we think it manifest, was, not to any considerable extent to change the law, but to remove doubts, to reconcile discrepancies and contradictory enactments, to give sanction of positive law to rules which before stood on the authority of usage, reasonable deduction and judicial decision, and to render all the enactments of the statute law more clear, concise and practical. But we think it was not intended to alter to any considerable extent the rules of law affecting the rights of parties, and wherever there was such a purpose manifested, it was intended that new rules should operate prospectively, and not affect past transactions. Wherever the change in the law was most considerable—as the rules affecting real property—there was a provision postponing the operation of the new rules to a future day. It is, therefore, we think, more consonant with the manifest intent of the legislature, as well as more consistent with principles of justice, in construing any particular provision of the revised statutes, which varies, in any respect, from the corresponding provision of the old law for which it was substituted, to give it a prospective operation, and not to give such a construction, unless necessary, as to disturb existing relations, or unsettle existing rights, duties and liabilities.”⁷¹

⁶⁸ First Nat. Bank v Dimmick, 190 Ala. 359, 67 So. 309; French v Powers, 80 N.Y. 146.

⁶⁹ First National Bank v Dimmick, 190 Ala. 359; State v McCort, 23 La. Ann. 326; Wright v Oakley, 5 Metc. (Mass.) 400; Smith v Haines, 58 N.H. 157; French v Powers, 80 N.Y. 146. But see Tennessee River Nav. Co. v Grantland, 199 Ala. 674, 75 So. 283; Lefferts v Hollister, 10 How. Pr. (N.Y.) 383, where retroactive effect was given.

⁷⁰ See §§ 277-294, Chapter XXV, *supra*.

⁷¹ Wright v Oakley (Mass.) 5 Metc. 400.

CHAPTER XXX
SPECIFIC STATUTES CONSTRUED

- § 328. In General.
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- § 331. Bankruptcy.
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- § 362. Pardon and Parole.
- § 363. Usury.
- § 364. Small Loan Acts.
- § 365. Initiative and Referendum.
- § 366. Declaratory Judgments.

§ 328. **In General.**—It is deemed desirable that certain of the more important statutory enactments, particularly those which seem to play an increasingly important role in human affairs, should be discussed separately in so far as the basic principles of construction are concerned, even though it may, to a limited extent, require the repetition of some phases already discussed. Obviously, a detailed treatment is impossible within the scope of this treatise, as many of the specific statutes could be fully treated only in a chapter or perhaps a work confined solely to the statute under consideration. As a result, this chapter is intended to present a concise survey of the numerous general principles of construction in order that one may readily ascertain the manner in which the courts construe the statutes here discussed.

§ 329. **Adoption of Children.**—The better, and perhaps the prevailing rule, subjects adoption statutes to a liberal construction¹ in favor of the adopted child.² Such a construction finds its justification in the primary purpose of adoption statutes—the promotion of the welfare of the child.³ Consequently, the statute should be liberally construed to effectuate that excellent and humane purpose.⁴ On the other hand, the rule which may properly be referred to as the minority view, subjects statutes of adoption to a strict construction.⁵ They are subjected to this sort of construction largely because they are deemed to be in derogation of the common

¹ *Cofer v Scroggins*, 98 Ala. 342, 13 So. 115; *Boaz v Swinney*, 79 Kan. 332, 99 Pac. 621; *People v Blodel*, 4 N.Y.S. 110; *In re Howard*, 125 Okla. 86, 256 Pac. 54; *In re Roderick*, 158 Wash. 377, 291 Pac. 325, 80 A.L.R. 1398; *Glascott v Bragg*, 111 Wis. 605, 87 N.W. 853; *Nugent v Powell*, 4 Wyo. 173, 33 Pac. 23, 20 L.R.A. 199.

² *Shaw v Scott*, 217 Iowa 1259, 252 N.W. 237; *Shepherd v Murphy*, 332 Mo. 1176, 61 S.W. (2) 746. This is especially true where a liberal construction is required by a code provision. *Landferman v Vanzile*, 150 Ky. 751, 150 S.W. 1008.

³ *Boaz v Swinney*, 79 Kan. 332, 99 Pac. 621; *Leonard v Honisfager*, 43 Ind. Ap. 607, 88 N.E. 91; *Parsons v Parsons*, 101 Wis. 77 N.W. 147.

⁴ *Ibid.* Also see *Shaw v Scott*, 217 Iowa 1259, 252 N.W. 237; *Drake v Drake*, 328 Mo. 966, 43 S.W. (2) 556.

⁵ *Wallace v Rappleye*, 103 Ill. 229; *Purinton v Jamrock*, 195 Mass. 187, 80 N.E. 802; *Ferguson v Herr*, 64 Neb. 649, 90 N.W. 625, 94 N.W. 542; *In re Monroe's Exrs.*, 229 N.Y.S. 476; *Grimes v Grimes*, 207 N.C. 778, 178 S.E. 573; *Smith v Bradford*, 51 R.I. 289, 154 Atl. 272.

law.⁶ Some cases while not definitely adhering to either of the aforesaid rules, show a tendency toward a liberal⁷ or a reasonable construction.⁸ Other cases seem to make a distinction between the act of adoption, and the procedure pertaining thereto; the latter being subjected to a liberal construction.⁹ If the adoption statute is liberally construed, of course, substantial compliance with its provisions will be sufficient;¹⁰ if it is strictly construed, its provisions must be strictly complied with.¹¹

These statutes are also to be strictly construed in favor of the natural parents of the child, and all doubts resolved in their favor;¹² at least, in so far as the general course of descent and distribution on account of blood relationship is concerned.¹³ And in the construction of adoption acts in this respect, general statutes of descent are in *pari materia* and may be resorted to for assistance in their construction.¹⁴

⁶ Ex parte Clark, 87 Calif. 638, 25 Pac. 967; Ryan v Foreman, 262 Ill. 175, 104 N.E. 189; Siebert v Siebert, 170 Iowa 561, 153 N.W. 160; Sarazin v Union R. Co., 153 Mo. 479, 55 S.W. 92; Lacher v Venus, 177 Wis. 558, 188 N.W. 613.

⁷ In re McKeag, 141 Calif. 403, 74 Pac. 1039.

⁸ Fosburgh v Rogers, 114 Mo. 122, 21 S.W. 82, 19 L.R.A. 201. Also see In re Johnson, 98 Calif. 531, 33 Pac. 460; Hopkins v Antrobus, 120 Iowa 21, 94 N.W. 251; In re Howard's Estate, 125 Okla. 86, 256 Pac. 54.

⁹ Hockaday v Lynn, 200 Mo. 456, 98 S.W. 585; Magevney v Karsch, 167 Tenn. 32, 65 S.W. (2) 562; James v Williams, 169 Tenn. 41, 82 S.W. (2) 541.

¹⁰ Cofer v Scroggins, 98 Ala. 342, 13 So. 115; In re Taggart, 190 Calif. 493, 213 Pac. 504; Sires v Melvin, 135 Iowa 460, 113 N.W. 106; Malaney v Cameron, 98 Kan. 620, 159 Pac. 19; Davis v McGraw, 206 Mass. 294, 92 N.E. 332.

¹¹ In re Cozza, 163 Calif. 514, 126 Pac. 161; Watts v Dull, 184 Ill. 86, 56 N.E. 303; McCollister v Yard, 90 Iowa 621, 57 N.W. 447; Purinton v Jamrock, 195 Mass. 187, 80 N.E. 802; Hockaday v Lynn, 200 Mo. 456, 98 S.W. 585; Kofka v Rosicky, 41 Neb. 328, 59 N.W. 788; Matter of Ziegler, 143 N.Y.S. 562, 82 Misc. R. 346. That such statutes are exclusive, see Reeves v Tunnell (Tex.) 21 S.W. (2) 365, rev. 35 S.W. (2) 707.

¹² In re Jackson (Nev.) 28 Pac. (2) 125. The term "child" refers to the offspring of others than the adopting person, First Nat. Bank v Mott, 101 Fla. 1224, 133 So. 78, and not as signifying minority. State ex Bulik v Calhoun, 330 Mo. 1172, 52 S.W. (2) 742.

¹³ Keegan v Geraghty, 101 Ill. 26; Ferguson v Herr, 64 Neb. 649, 90 N.W. 625, 94 N.W. 542; Upson v Noble, 35 Ohio St. 655.

¹⁴ Batchelder v Walworth (Vt.) 82 Atl. 7. Also note Power v Hafley, 85 Ky. 671, 4 S.W. 683. Similarly, statutes relating to adoption proceedings and those relating to the juvenile courts, when construed together, may be consistent and jointly operative. Morrow v Brashears, 265 Ky. 203, 96 S.W. (2) 434.

§ 330. **Attachment and Garnishment.**—Since the remedy by attachment is in derogation of the common law,¹⁵ and since it is also a violent and summary proceeding,¹⁶ it should be given a strict construction.¹⁷ In other words, the remedy is construed strictly in favor of those against whom it is invoked.¹⁸ It must be confined strictly to the grounds upon which the statute allows it.¹⁹ Similarly, the remedy of garnishment should be given a strict construction,²⁰ since it too is purely statutory,²¹ in derogation of the common law,²² and a harsh and violent remedy.²³ Consequently, like attachment statutes, those pertaining to garnishment cannot be extended to cases not within both the letter and the spirit.²⁴ But a strict construction should not be used to nullify the effectiveness of such statutes,²⁵ or defeat their very purpose because of unnecessary

¹⁵ *American Nat. Bank v Douglas*, 126 Ark. 7, 189 S.W. 161; *Miller v Zeigler*, 44 W.Va. 484, 29 S.E. 981.

¹⁶ *U.S. v Pacific Forwarding Co.*, 8 Fed. Supp. 647; *Wilkie v Jones, Morris (Iowa)* 97; *Munroe v Williams*, 37 S.C. 81, 16 S.E. 533.

¹⁷ *In re Robinson's Estate*, 112 N.Y.S. 280; *Miller v Zeigler*, 44 W.Va. 484, 29 S.E. 981. Also see *Van Norman v Circuit Judge*, 43 Mich. 461, 5 N.W. 669; *Judson v Smith*, 104 Mo. 61, 15 S.W. 956. But statutes may require a liberal construction. *The Ohio v Stunt*, 10 Ohio St. 582. And a statute providing for attachment in an equitable proceeding, being remedial, should be liberally construed. *Marsh v Moore*, 52 R.I. 458, 161 Atl. 224. And a statute which provides a method for resisting an attachment is not subject to strict construction. *Mitchell v Wood*, 11 Ark. 180.

¹⁸ *U.S. v Bailey*, 53 Fed. (2) 286; *Toth v Toth*, 242 Mich. 23, 217 N.W. 913, 56 A.L.R. 839; *Smith v Buck*, 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343; *Lastowski v Lawniecki*, 115 N.J.L. 230, 179 Atl. 266.

¹⁹ *Williams v Fourth National Bank*, 15 Okla. 477, 82 Pac. 496. The cases to which it may be extended should not include any beyond the requirements of the statute. *Mitchell v St. Maxent*, 4 Wall. (U.S.) 237, 18 L.Ed. 326.

²⁰ *U.S. v Pacific Forwarding Co.*, 8 Fed. Supp. 647; *Duval County v Charleston Lumber Co.*, 45 Fla. 256, 33 So. 531, 60 L.R.A. 549.

²¹ *Missouri Pac. R. Co. v McLenden*, 185 Ark. 204, 46 S.W. (2) 626; *Duval County v Charleston Lumber Co.*, *ibid.*

²² *American National Bank v Douglas*, 126 Ark. 7, 189 S.W. 161; *Olds v Olds*, 219 Iowa 1395, 261 N.W. 488; *Bethell v Lee*, 200 N.C. 755, 158 S.E. 493.

²³ *Toth v Toth*, 242 Mich. 23, 217 N.W. 913, 56 A.L.R. 839.

²⁴ *U.S. v Bailey*, 52 Fed. (2) 286; *Siegel v Schueck*, 167 Ill. 522, 47 N.E. 855; *Penn. R. Co. v Rogers*, 52 W.Va. 450, 44 S.E. 300, 60 L.R.A. 178.

²⁵ *Black v Plumb*, 94 Colo. 318, 29 Pac. (2) 708, 91 A.L.R. 1334; *Reyburn v Brackett*, 2 Kan. 227. Or leave the creditor remediless. *Fulwider v Benda (S.D.)* 253 N.W. 154.

technicality.²⁶ Undoubtedly, constructions of this character led to the enactment of statutes requiring attachment and garnishment laws to be liberally construed.²⁷ In the absence, however, of such special rules of construction, the rules applicable to statutes generally will also apply to attachment and garnishment statutes. For instance, words of common usage should be given their common meaning,²⁸ statutes in *pari materia* should be considered;²⁹ and if the statute has been adopted from another jurisdiction, the constructions of that statute may be properly referred to and followed,³⁰ unless clearly erroneous.³¹

§ 331. Bankruptcy.—According to the better view, the bankruptcy act, being in its nature remedial,³² is entitled to a liberal construction in favor of the bankrupt.³³ It should also receive a practical and a uniform construction,³⁴ and be reasonably inter-

²⁶ *Miller v Ziegler*, 44 W.Va. 484, 29 S.E. 981.

²⁷ *Black v Plumb*, 94 Colo. 318, 29 Pac. (2) 708, 91 A.L.R. 1334; *Griffith v Milwaukee Harvester Co.*, 92 Iowa 634, 61 N.W. 243; *Smith v Buck*, 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343.

²⁸ *Miller v Zeigler*, 44 W.Va. 484, 29 S.E. 981. City fireman's compensation held to be salary and not wages. *Smith v Mobile*, 230 Ala. 584, 162 So. 361. Officers elected by the people are "public officers". *Fischer v Dubroca*, 163 La. 292, 111 So. 710.

²⁹ *Barber v Morgan*, 84 Conn. 618, 80 Atl. 791. And see *First Nat. Bank v Vicksburg (La. Ap.)* 171 So. 151. Also note in particular *Campbell v Alleghaney Corp.*, 75 Fed. (2) 947.

³⁰ *Henrietta Min. Co. v Gardner*, 173 U.S. 123, 43 L.Ed. 637, 19 S.Ct. 327.

³¹ *Ancient Order of Hibernians v Sparrow*, 29 Mont. 132, 74 Pac. 197, 64 L.R.A. 128.

³² *In re Russell*, 28 Fed. (2) 48; *In re Muller*, Fed. Cas. 9,912; *Mims v Lockett*, 20 Ga. 474; *Campbell v Perkins*, 8 N.Y. 430. Also see cases under note 35, *infra*. Contra: *Salters v Tobais*, 3 Paige (N.Y.) Ch. 338 (subjected to strict construction on the ground that it was in derogation of common right.)

³³ *Maynard v Elliott*, 283 U.S. 273, 75 L.Ed. 1028, 51 S.Ct. 390; *Spies v Sytsma*, 56 Fed. (2) 520.

³⁴ *Kreitlein v Ferger*, 238 U.S. 21, 59 L.Ed. 1184, 35 S.Ct. 685. It should also be construed so as to bring about a settlement of the estate as soon as possible. *In re Rochester Pad & Wrapper Co.*, 20 Fed. Supp. 295, and in the spirit of the strictest economy. *In re Higgins Mfg. Co.*, 19 Fed. Supp. 120.

preted in order to promote the object of the law.³⁵ To attain this, the court will, of course, apply the usual rules which pertain to the construction of statutes generally.³⁶ For instance, absurd and unreasonable constructions will be avoided if possible.³⁷ The same is true with reference to those constructions which impose hardship and inconvenience,³⁸ or operate to produce mischievous results.³⁹ And, as in the case of all statutes, the intent of the legislature is, and must be, the primary consideration.⁴⁰ To ascertain that intent, the court may refer to the forms prescribed by the United States Supreme Court,⁴¹ to previous laws of bankruptcy,⁴² and to the legis-

³⁵ *Dilworth v Boothe*, 69 Fed. (2) 621; *In re Scott*, 126 Fed. 981; *In re Rhoads*, 98 Fed. 514; also see *Costello v Harbaugh*, 83 Ill. Ap. 29, af. 184 Ill. 110, 56 N.E. 363. And its general purpose is to relieve the honest debtor from oppressive indebtedness. *Local Loan Co. v Hunt*, 292 U.S. 234, 78 L.Ed. 1230, 54 S.Ct. 695.

³⁶ *Bardes v First Nat. Bank*, 178 U.S. 524, 44 L.Ed. 1175, 20 S.Ct. 100. The word "creditor" should be given the meaning usually attributed to it when used in the common law definition of fraudulent conveyances. *American Surety Co. v Maratta*, 287 U.S. 513, 77 L. Ed. 466, 53 S.Ct. 260. That "bankruptcy" and "insolvency" are convertible terms, see *Timmer v Hardwick State Bank*, 194 Minn. 586, 261 N.W. 456. Acts in *pari materia* may be consulted. *In re Standard Composition Co.*, 23 Fed. Supp. 391 (social security legislation did not amend the bankruptcy act by implication); *Maroney v LaBarre*, 77 N.J.L. 556, 70 Atl. 156 (state insolvency law providing for the discharge of persons from imprisonment for debt, as amended, did not conflict with the federal bankruptcy act). An exemption from the plain requirements of the law, concerning the timeliness of action and notice, may not be lightly granted, although the act is to be liberally construed. *In re Scheffler*, 21 Fed. Supp. 569.

³⁷ *Peck v Jenness (U.S.)* 7 How. 612, 12 L.Ed. 841.

³⁸ *Holt v Henley*, 232 U.S. 273, 75 L.Ed. 1028, 51 S.Ct. 390. Accordingly, the act should not be interpreted to deprive the wife and the children of the bankrupt of the support and maintenance due from him. *Smith v Smith*, 7 Fed. Supp. 490.

³⁹ *Bukett v Columbia Bank*, 195 U.S. 345, 49 L.Ed. 231, 25 S.Ct. 38 (allowing bankrupt to retain and control assets). Nor should it be construed so as to assist or encourage dishonest bankrupts. *In re Katz*, 23 Fed. Supp. 431.

⁴⁰ *Holt v Henley*, 232 U.S. 273, 75 L.Ed. 1028, 51 S.Ct. 390. But the court will not allow the direct letter of the act to be overthrown by its conception of its spirit. *In re Hall*, 27 Fed. (2) 999.

⁴¹ *Zavelo v Reeves*, 227 U.S. 625, 57 L.Ed. 676, 33 S.Ct. 365. Also see *In re Levin*, 176 Fed. 177, where general orders of the supreme court were also referred to for assistance.

⁴² *Crawford v Burke*, 195 U.S. 176, 49 L.Ed. 147, 25 S.Ct. 9.

lative history of the act.⁴³ The punctuation may be consulted,⁴⁴ and even supplied.⁴⁵ If general words are followed by specified exceptions, all others are excluded. Thus, the exception of "all judgments in actions for fraud" from the discharge, indicated that only such actions as had been reduced to judgment were excepted.⁴⁶ Similarly, the rule of implied exclusion is applicable to the bankruptcy act. For instance, the provision that certain debts contracted after the passage of the bankruptcy law would not be discharged, indicated that if they were contracted before the passage of the law, they would not be discharged.⁴⁷ Nor can specific provisions be treated abstractly. In order to ascertain the legislative intention, every section, sub-section and provision should be construed together.⁴⁸ In fact, the titles of the various sections may also be considered.⁴⁹ Later amendments, of course, cannot be ignored.⁵⁰ But such amendments, or for that matter the bankruptcy act proper, will not operate retroactively so as to apply to pending cases, in the absence of a clear indication to the contrary.⁵¹

§ 332. Exemptions.—According to the prevailing and proper view, exemption statutes should be liberally construed in favor of

⁴³ *Loeser v Savings Bank*, 148 Fed. 975.

⁴⁴ *Jay v St. Louis*, 138 U.S. 1, 34 L.Ed. 843, 11 S.Ct. 243.

⁴⁵ *Crawford v Burke*, 195 U.S. 176, 49 L.Ed. 147, 25 S.Ct. 9 (comma inserted).

⁴⁶ *Crawford v Burke*, *ibid.*

⁴⁷ *Chapman v Forsyth* (U.S.) 2 How. 202, 11 L.Ed. 236. Also see *Fefft v Munsuri*, 222 U.S. 114, 56 L.Ed. 118, 32 S.Ct. 67.

⁴⁸ *West v Lee Bros.*, 174 U.S. 590, 43 L.Ed. 1098, 19 S.Ct. 836; *In re Miner*, 9 Fed. Supp. 1.

⁴⁹ *Holden v Stratton*, 198 U.S. 202, 49 L.Ed. 1018, 25 S.Ct. 656.

⁵⁰ *Summers v Collector of Taxes*, 92 Fed. (2) 819. But it will not be presumed that a later provision has repealed any existing provision by implication, in the absence of persuasive language. *In re Miner*, 9 Fed. Supp. 1.

⁵¹ *Anderson v Akers*, 11 Fed. Supp. 9; *In re Ritz Carlton Restaurant & Hotel Co.*, 24 Fed. Supp. 78.

the debtor.⁵² Therefore, in case of doubt, that construction will be accepted by the court which will best effectuate the humane purpose of exemption statutes—to keep the debtor from becoming a public charge.⁵³ But the construction should not be so liberal that fraud is favored,⁵⁴ or the manifest intent of the legislature defeated.⁵⁵ Those cases adhering to the rule of strict construction⁵⁶ apparently do so on the ground that statutes exempting a debtor's property from the payment of his debts are not remedial in their nature but, on the contrary, are in derogation of the common law and confer immunities and privileges in opposition thereto.⁵⁷ A few authorities seem to pretend to follow neither rule.⁵⁸ As a result of the majority rule, however, any statute which seeks to

⁵² *In re McFarland*, 49 Fed. (2) 342; *In re Crum*, 221 Fed. 729; *Ellis v Pratt City*, 111 Ala. 629, 20 So. 649; *Sandberg v Borstadt*, 48 Colo. 96, 109 Pac. 419; *Kirksey v Rowe*, 114 Ga. 339, 40 S.E. 990; *Equitable Life Assur. Soc. v Goode*, 101 Iowa 160, 70 N.W. 113; *George v Hunter*, 48 Kan. 651, 29 Pac. 1148; *Pond v Kimball*, 101 Mass. 105; *Hutchinson v Whitmore*, 90 Mich. 255, 51 N.W. 451; *Martin v Barnett*, 158 Mo. Ap. 375, 138 S.W. 538; *Yates County Nat. Bank v Carpenter*, 119 N.Y. 550, 23 N.E. 1108, 7 L.R.A. 557; *Hart v Cole*, 73 Ohio St. 267, 76 N.E. 940; *State v Collins*, 70 Okla. 323, 174 Pac. 658; *Childers v Brown*, 81 Ore. 1, 158 Pac. 166; *Keelin v Graves*, 129 Tenn. 103, 165 S.W. 232; *Green v Raymond*, 58 Tex. 80; *State v McNeill*, 58 Wash. 47, 107 Pac. 1028; *State v Allen*, 48 W.Va. 154, 35 S.E. 990; *Cunningham v Britson*, 101 Wis. 378, 77 N.W. 740. Also see *Prouty v Hall* (Mo.) 31 S.W. (2) 103, that the exemption should be liberally construed for the protection of the widow and children.

⁵³ *Grimestad v Lofgren*, 105 Minn. 286, 117 N.W. 515. Also see *Finlen v Howard*, 126 Ill. 259, 18 N.E. 560. Exemption laws should be liberally construed because they are remedial, beneficial and humane in character. *Nelson v Fightmaster*, 4 Okla. 38, 44 Pac. 213; *Pinson v Murphy*, 220 Ky. 464, 295 S.W. 442; *Kelley v Butler*, 182 Wash. 310, 47 Pac. (2) 664.

⁵⁴ *In re Gerber*, 186 Fed. 693; *Jetton Lumber Co. v Hall*, 67 Fla. 61, 64 So. 440; *Elliott v Hall*, 3 Idaho 421, 31 Pac. 796.

⁵⁵ *George v Hunter*, 48 Kan. 651, 29 Pac. 1148; *Rothschild v Boelter*, 18 Minn. 361. Wearing apparel will not include wages. *Dinkins v Crunden*, 91 Mo. Ap. 209. There can be no substantial departure from the express language. *Wertz v Häle*, 212 Iowa 294, 234 N.W. 534.

⁵⁶ *White v Leffner*, 30 La. Ann. 1280; *Rue v Alter* (N.Y.) 5 Den. 119; *Kirabb v Drake*, 23 Pa. St. 489. Also see Note, L.R.A. 1916B, 788.

⁵⁷ *Rue v Alter* (N.Y.) 5 Den. 119.

⁵⁸ See *Wilbert's Sons v Ricord*, 167 La. 416, 119 So. 411; *Rynella-Mill, etc., Co. v Segura*, 128 La. 643, 55 So. 2. Formerly, the court applied the rule of strict construction. *White v Leffner*, 30 La. Ann. 1280; *Crilly v Deville*, 21 La. Ann. 686. Perhaps the later cases merely represent a step in the process of evolution of the majority view in Louisiana.

limit the scope or benefit of an exemption statute will be strictly construed against the limitation.⁵⁹ But regardless of the type of construction applied by the court, it is simply an instrumentality to use in seeking the legislative intent. As a general rule, the court will resort to the usual principles of construction. For instance, the intent of the legislature will prevail over the strict letter;⁶⁰ the enactment will be considered as a whole;⁶¹ statutes in *pari materia* may be examined;⁶² the express mention of one thing impliedly excludes another of the same general class;⁶³ special words followed by general words will limit the former;⁶⁴ the provisions of an existing law may be repealed by the inconsistent and repugnant provisions of a later enactment;⁶⁵ and exemption statutes will not be construed as operating retrospectively, if avoidable.⁶⁶

The provisions of exemption statutes have been frequently involved in litigation where the language had to be construed in order to ascertain the legislative intention. For instance, "mechanic" is not limited to skilled persons,⁶⁷ butchering has been held to be a trade,⁶⁸ a piano has been considered household furniture,⁶⁹ a porta-

⁵⁹ *Osterhoudt v Stade*, 117 N.Y.S. 809, 133 Ap. Div. 83; *State v Shook*, 97 Ohio St. 164, 118 N.E. 1010.

⁶⁰ *Roberts v Carrithers*, 180 Ky. 315, 202 S.W. 659; *Yates County Nat. Bank v Carpenter*, 119 N.Y. 550, 23 N.E. 1108; *Mundell v Hammond*, 40 Vt. 641. Also see *Wilbert's Sons v Ricord*, 167 La. 416, 119 So. 411.

⁶¹ *Cook v Allee*, 119 Iowa 226, 93 N.W. 93; *In re Blattner*, 89 Wash. 412, 154 Pac. 796.

⁶² *Ibid.*

⁶³ *Taylor v Barker*, 95 N.Y.S. 474, 108 Ap. Div. 21.

⁶⁴ *Williams v Vincent*, 70 Kan. 595, 79 Pac. 121; *Bevitt v Crandall*, 19 Wis. 581, mod. 52 Wis. 315, 9 N.W. 25.

⁶⁵ *Jumper v Moore*, 110 Me. 159, 85 Atl. 485. But repeals by implication are not favored. *In re Blattner*, 89 Wash. 412, 154 Pac. 796.

⁶⁶ *Love v First Nat. Bank*, 228 Ala. 258, 153 So. 189; *Hair v Ramsey*, 165 Tenn. 148, 53 S.W. (2) 381. Also see *In re Messinger*, 29 Fed. (2) 158, 68 A.L.R. 1205, where new property was included. Generally, the repeal of an exemption applies to existing judgments only.

⁶⁷ *Baker v Maxwell*, 183 Iowa 1192, 168 N.W. 160, 2 A.L.R. 814.

⁶⁸ *Hoyt v Pullman*, 51 Okla. 717, 152 Pac. 386.

⁶⁹ *Phillips v Phillips*, 151 Ala. 527, 44 So. 391; *Alsup v Jordan*, 69 Tex. 300, 6 S.W. 831; *Cook v Fuller*, 35 Okla. 339, 130 Pac. 140; *Von Storch v Winslow*, 13 R.I. 23. *Contra*: *Trieber v Knabe*, 12 Md. 491; *Kehl v Dunn*, 102 Mich. 581, 61 N.W. 71; *Tanner v Billings*, 18 Wis. 163 (applying rule of *ejusdem generis*).

ble steam saw mill has been held a tool,⁷⁰ and the commissions of a traveling salesman selling by sample have been regarded as wages.⁷¹ As may be gathered from the foregoing examples, the courts have been liberal in their construction in favor of the debtor.⁷²

§ 333. **Homesteads.**—Like exemption statutes generally, those which pertain to homesteads, in accord with the majority view, should be liberally construed in favor of the debtor.⁷³ As a result, homestead statutes are to be liberally construed to further their beneficial purposes⁷⁴ to create self-reliant home owners,⁷⁵ to protect

⁷⁰ *Baker v Maxwell*, 183 Iowa 1192, 168 N.W. 160, 2 A.L.R. 814.

⁷¹ *Hamberger v Marcus*, 157 Pa. St. 133, 27 Atl. 681. And see *Rikerd v Crouch*, 135 Mich. 703, 98 N.W. 739, where piece work earnings were held to be wages. The phrase "income, claim, or demand" which was specifically exempt from execution, included pensions and workmen's compensation payments. *Lauer v Moody* (Ind.) 154 N.E. 501.

⁷² *Baker v Maxwell*, 183 Iowa 1192, 168 N.W. 160, 2 A.L.R. 814; *Howard v Williams*, 2 Pick. (Mass.) 80. For construction of "employee" and "laborer", see *Shriver v Carlin, etc., Co.*, 155 Md. 51, 141 Atl. 439, 58 A.L.R. 778; insurance agent as a laborer, see *Lames v Armstrong*, 162 Iowa 327, 144 N.W. 1; family and head of family defined, *Peerless Pac. Co. v Burchard*, 90 Wash. 221, 155 Pac. 1037; "lawyer", defined, *Equitable L. Assur. Soc. v Goode*, 101 Iowa 160, 70 N.W. 113; "farmer" defined, *Hickman v Cruise*, 72 Iowa 528, 34 N.W. 316. Automobile held exempt, see *Dowd v Heuson*, 122 Kan. 278, 252 Pac. 260, 52 A.L.R. 823; *Spangler v Carless*, 61 Utah 88, 211 Pac. 692, 28 A.L.R. 72. Contra: *Whitney v Welnitz*, 153 Minn. 162, 190 N.W. 57.

⁷³ *In re Jarrell*, 34 Fed. (2) 970; *In re Hewitt*, 244 Fed. 245; *Roy v Roy*, 233 Ala. 440, 172 So. 253; *Stuckey v Horn*, 132 Ark. 357, 200 S.W. 1025; *Keyes v Cyrus*, 100 Calif. 322, 34 Pac. 722; *Leppel v Kus*, 38 Colo. 310, 122 Pac. 392; *Perkins v Perkins*, 122 Ill. Ap. 370; *Dean v Evans*, 106 Kan. 389, 188 Pac. 436; *Riggs v Sterling*, 60 Mich. 643, 27 N.W. 705; *Brennecke v Riemann* (Mo.) 102 S.W. (2) 874; *Barney v Leeds*, 51 N.H. 253; *Robinson v Wiley*, 15 N.Y. 489; *Kelly v McLeod*, 165 N.C. 382, 81 S.E. 455; *Hill v Myers*, 46 Ohio St. 183, 19 N.E. 593; *Jackson v Shelton*, 89 Tenn. 82, 16 S.W. 142; *Schnieder v Bray*, 59 Tex. 668; *Jewett v Guyer*, 38 Vt. 200; *Security Nat. Bank v Mason* (Wash.) 200 Pac. 1097; *Bartle v Bartle*, 132 Wis. 392, 112 N.W. 471.

⁷⁴ *Fink v O'Neil*, 106 U.S. 272, 1 S.Ct. 325, 27 L.Ed. 196; *Clements v Crawford*, 64 Ark. 7, 40 S.W. 132; *Keyes v Cyrus*, 100 Calif. 322, 34 Pac. 722; *Towle v Towle*, 81 Kan. 675, 107 Pac. 228; *Brixius v Reimringer*, 101 Minn. 347, 112 N.W. 273; *Mandan Mercantile Co. v Sexton*, 29 N.D. 602, 151 N.W. 780; *Andrews v Security Nat. Bank*, 121 Tex. 409, 50 S.W. (2) 253, 83 A.L.R. 44; *Woodbury v Warren*, 67 Vt. 251, 31 Atl. 295; *State ex rel. Van Doren v Superior Ct.*, 179 Wash. 241, 37 Pac. (2) 215.

⁷⁵ *Pocoke v Peterson*, 256 Mo. 501, 165 S.W. 1017.

the home of the state's citizens,⁷⁶ to save the family from destitution and society from the danger of citizens becoming paupers.⁷⁷

Since such statutes are not in derogation of the common law,⁷⁸ they are for that reason properly subjected by the court to a liberal construction.⁷⁹ Such a construction is also required by virtue of the fact that they are remedial in character.⁸⁰ But a liberal construction does not justify a construction which disregards plain words,⁸¹ or one which is contrary to the legislative intent.⁸² Nor should there be such liberality as will make the act an instrument of fraud⁸³ or operate to protect those not intended to be protected.⁸⁴

And in seeking to determine the legislative intention, the courts will resort to and apply the general rules of construction.^{84a} For instance, the intent of the legislature is the primary consideration.⁸⁵ Statutes in *pari materia* may be examined.⁸⁶ Homestead statutes,

⁷⁶ *Riggs v Sterling*, 60 Mich. 643, 27 N.W. 705. Also see *First State Bank v Fischer* (N.D.) 272 N.W. 752; *Hensley v Maxwell*, 172 Okla. 21, 49 Pac. (2) 60.

⁷⁷ *Anderson v Shannon* (Kan.) 73 Pac. (2) 5; *In re Mower's Estate (Utah)* 73 Pac. (2) 967.

⁷⁸ *Riggs v Sterling*, 60 Mich. 643, 27 N.W. 705. *Contra*: *Galligar v Payne*, 34 La. Ann. 1057; *Beatty v Wardell*, 130 Iowa 651, 105 N.W. 357; also see *Deere v Chapman*, 25 Ill. 610. This of itself would entitle homestead statutes to a liberal construction.

⁷⁹ See § 248, *supra*, for treatment of the strict construction of statutes, in derogation of the common law.

⁸⁰ *In re Sterling*, 20 Fed. Supp. 924.

⁸¹ *Hines v Duncan*, 79 Ala. 112; *Charles v Lambertson*, 1 Iowa 435; *Fred v Braman*, 97 Minn. 484, 107 N.W. 159. Also see *Regan v Ensley*, 283 Mo. 297, 222 S.W. 773; *Sexton v Sutherland*, 42 N.D. 509, 174 N.W. 214. The construction should be fair and rational and not arbitrary. *Smith v Andrews*, 209 Iowa 99, 227 N.W. 587.

⁸² *Dennis v Gorman* (Mo.) 233 S.W. 90.

⁸³ *Croker v Croker*, 51 Fed. (2) 11; *In re Rippa*, 180 Fed. 603; *Clark v Cox*, 80 Fla. 63, 85 So. 173; *Mounger v Gandy*, 110 Miss. 133, 69 So. 817; *Fingholm v Ekrem*, 18 N.D. 185, 119 N.W. 35. Also see *Volker-Scowercroft Lumber Co. v Vance*, 36 Utah 348, 103 Pac. 970, and *Schoenheider v Tuengel*, 96 Wash. 103, 164 Pac. 748.

⁸⁴ *Floyd County v Wolfe*, 138 Iowa 749, 117 N.W. 32; *Union Trust Co. v Cox*, 55 Okla. 68, 155 Pac. 206.

^{84a} *In re Banfield's Estate*, 137 Ore. 167, 296 Pac. 1066, 293 Pac. 905.

⁸⁵ *Dennis v Gorman* (Mo.) 233 S.W. 50; *Sexton v Sutherland*, 42 N.D. 509, 174 N.W. 214.

⁸⁶ *Quade v Whaley*, 31 Calif. 526.

being favorites of the law, will be sustained whenever possible.⁸⁷ Retrospective operation, on the other hand, is not favored,⁸⁸ although there is some authority to the effect that the alteration or repeal of a homestead statute will operate retroactively and affect a previous right of exemption,⁸⁹ but the better view refuses to allow a homestead which has vested to be diminished by an alteration of the law.⁹⁰ This latter view certainly is more consonant with a liberal construction than is the former view. Also in accord with the rule of liberal construction, the courts have construed the word "family" to mean children,⁹¹ a parent and adult daughter as a "family",⁹² a wife to be the "head of a family", so far as a joint debt was concerned,⁹³ and the surviving spouse to be the "head of a family".⁹⁴

§ 334. Liens, Generally.—Generally speaking, there are two kinds of liens—statutory and common law. Nevertheless, statutes may be simply declaratory of common law liens⁹⁵ or in modification thereof.⁹⁶ Moreover, if the statutory lien is inconsistent with a common law lien, the latter will be excluded.⁹⁷ If the statutory lien is in derogation of the common law, it will be strictly con-

⁸⁷ *Pence v Price*, 211 N.C. 707, 192 S.E. 99.

⁸⁸ See cases cited under note 90, *infra*.

⁸⁹ *Carlisle v Godwin*, 68 Ala. 137; also see Note, 87 Am.Dec. 466, 467.

⁹⁰ *Cohen v Davis*, 20 Calif. 187; *Helfenstein v Cave*, 3 Iowa 287; *Dulanty v Pynchon* (Mass.) 6 Allen 510; *Galligher v Smiley*, 28 Neb. 189, 44 N.W. 187; *Orangeburg Bank v Kohn*, 52 S.C. 120, 29 S.E. 625; *Whitworth v McKee*, 32 Wash. 83, 72 Pac. 1046. Also see *Towle v Towle*, 81 Kan. 675, 107 Pac. 228.

⁹¹ *Miller v Finegan*, 26 Fla. 29, 7 So. 140, 6 L.R.A. 813. And see *Central Life Assur. Soc. v Gray* (Tex.) 32 S.W. (2) 259.

⁹² *In re Koehler*, 102 Kan. 878, 172 Pac. 25.

⁹³ *McPhee v O'Rourke*, 10 Colo. 301, 15 Pac. 420.

⁹⁴ *Breen v Breen*, 102 Kan. 766, 173 Pac. 2. But a widower living alone, without children or dependent, is not the "head of a family". *Gammon v McDowell*, 317 Mo. 1336, 298 S.W. 34. And note *Richmond v Ady*, 211 Iowa 101, 232 N.W. 813.

⁹⁵ See *Quist v Sandman*, 154 Calif. 748, 99 Pac. 204; *Parker-Harris Co. v Tate*, 135 Tenn. 509, 188 S.W. 54; *Bergman v Gay*, 79 Vt. 262, 64 Atl. 1106.

⁹⁶ *Robinson v Rogers*, 237 N.Y. 467, 143 N.E. 647.

⁹⁷ *Ridgely v Iglehart* (Md.) 3 Bland 540.

strued,⁹⁸ and will not be extended to cases not clearly included within its scope.⁹⁹ On the other hand, where the statute is simply declaratory of the common law, it must be construed in accord with common law principles.¹⁰⁰

§ 335. **Mechanic Liens.**—As to the nature of the construction to which mechanics' lien statutes should be subjected, there is considerable confusion in the authorities. If these statutes are regarded as in derogation of the common law, they should receive, for that reason, a strict construction.¹⁰¹ On the other hand, if they are regarded as remedial in nature, a liberal construction in favor

⁹⁸ *Cook v Bowden* (Ga.) 124 S.E. 61; *May Brick Co. v General Engineering Co.*, 180 Ill. 535, 54 N.E. 638; *State v Jackson*, 137 La. 931, 69 So. 751; *Porter v Sav. Bank*, 186 Mich. 355, 153 N.W. 19; *Rapp v Mabbett Motor Car Co.*, 194 N.Y.S. 200, 201 Ap. Div. 283; *Harriss v Parks*, 77 Okla. 197, 187 Pac. 470; *Corry v First Nat. Bank*, 10 Phila. 452; *McClellan v Haley* (Tex.) 237 S.W. 627. But where it is regarded as remedial, it should be liberally construed, *Mott v Wissler Min. Co.*, 135 Fed. 697; *Murphey v Brown*, 12 Ariz. 268, 100 Pac. 801; *Godfrey v Kline*, 167 Mich. 629, 133 N.W. 528; *DeWitt v Smith*, 63 Mo. 263; *Maynard v Ivey*, 21 Nev. 241, 29 Pac. 1090; *Hudler v Golden*, 36 N.Y. 446; *Bullock v Horn*, 44 Ohio St. 420, 7 N.E. 737; *Williams v Birmingham*, 129 Tenn. 680, 168 S.W. 160, but not to include property or persons clearly not intended. See cases under note 99, *infra*.

⁹⁹ *In re Rudd*, 180 Fed. 312; *Fishback v Foster*, 32 Ariz. 206, 202 Pac. 806; *Anderson v Baker*, 175 Ill. Ap. 254; *Rogers v Currier* (Mass.) 13 Gray 129; *Buchan v Sumner* (N.Y.) 2 Barb. Ch. 165; *Gile v Atkins*, 193 Me. 223, 44 Atl. 896; *McClellan v Haley* (Tex.) 237 S.W. 627; *Wilson v Rudd*, 70 Wis. 98, 35 N.W. 321. This is also true if the lien statute is in derogation of common right. *Gleason v Drilling Co. (La.)* 183 So. 67.

¹⁰⁰ *Mendilie v Snell*, 22 Idaho 663, 127 Pac. 550. Also see *Weber v Pearson*, 132 Ark. 101, 200 S.W. 273.

¹⁰¹ *Gilbert v Talladega Hardware Co.*, 195 Ala. 474, 70 So. 660; *E. J. Hollingsworth v Fire Ins. Co. (Dela.)* 175 Atl. 266; *Armstrong v Obucino Sash Co.*, 313 Ill. 448, 145 N.E. 243; *Perfection Tire Co. v Kellogg-Mackay Co.*, 194 Iowa 523, 187 N.W. 32; *Alguire v Keller*, 68 Pa. Super. 279. Such a construction is also justified where the statute is regarded in derogation of common right. *Fox v Rucker*, 30 Ga. 525; *Pugh Co. v Wallace*, 198 Ill. 422, 64 N.E. 1005; *Southern Gas Line v Dixie Oil Co.*, 16 La. Ap. 181. The lien will not be extended by implication. *Melcher Lumber Co. v Robertson Co.*, 217 Iowa 31, 250 N.W. 594.

of the lien would seem proper,¹⁰² and that construction adopted which will best effectuate the statute's purpose and protect its intended beneficiaries.¹⁰³ In fact, some statutes expressly declare that they shall be liberally construed.¹⁰⁴ And a number of cases also indicate that statutes pertaining to mechanics' liens may be subject both to a strict and a liberal construction,¹⁰⁵ depending upon which part of the statute is involved.^{105a} Thus, a strict construc-

¹⁰² *Davis v Alvord*, 94 U.S. 545, 24 L.Ed. 283; *McClung v Paradise Gold Min. Co.*, 164 Calif. 517, 129 Pac. 774; *Midland R. Co. v Wilcox*, 122 Ind. 84, 23 N.E. 506; *Deatherage v Henderson*, 43 Kan. 684, 23 Pac. 1052; *Berglund v Abram*, 148 Minn. 412, 182 N.W. 624; *De Witt v Smith*, 63 Mo. 263; *Shultz v C. H. Quereau Co.*, 210 N.Y. 257, 104 N.E. 621; *State v U.S. Fidelity & Guar. Co.*, 125 Ore. 13, 265 Pac. 775; *Findorff v Fuller & Johnson*, 212 Wis. 365, 248 N.W. 766.

¹⁰³ *McGuinn v Federated Mines*, 160 Mo. Ap. 28, 141 S.W. 467; *McDermott, Inc., v Lawyers Mortg. Co.*, 232 N.Y. 336, 133 N.E. 909. It will be liberally construed to preserve the intended benefit. *Waters v Gallemore* (Mo. Ap.) 41 S.W. (2) 870. It should be construed so as to reasonably and fairly carry out the remedial intent. *New Haven Orphans Asylum v Haggerty Co.*, 108 Conn. 232, 142 Atl. 847. Thus, a church was held to be a "building", *Cain v Rea*, 159 Va. 446, 166 S.E. 478, and a railway canal a "structure". *Black v Operator's Oil & Gas Co. (Tex.)* 37 S.W. (2) 313. But canals dug through lots are not "structures". *Healy v Toles*, 266 Mich. 534, 254 N.W. 213. For definition of "other structures", see *Western Electric Co. v Cooley (Calif.)* 251 Pac. 331. Moreover, the statutory procedure pertaining to the lien needs only to be substantially followed. *Adkins v Webb*, 160 Md. 571, 154 Atl. 259; *Austard v Dreier*, 57 N.D. 224, 221 N.W. 1; *George Lumber Co. v Harrison Constr. Co.*, 103 W.Va. 1, 136 S.E. 399. But see the following cases where the statute must be strictly followed: *Higgins Mfg. Co. v Hinig*, 38 Ohio Ap. 87, 175 N.E. 710; *Anastas v Brown*, 52 R.I. 462, 161 Atl. 218; *Coleman v Pearman*, 159 Va. 72, 165 S.E. 371.

¹⁰⁴ *Hermann v Mertens*, 87 Md. 725, 39 Atl. 618; *Ogden v Alexander*, 140 N.Y. 356, 35 N.E. 638; *Ellis-Myroie Lumber Co. v Bratt*, 119 Wash. 142, 205 Pac. 398.

¹⁰⁵ *Cary Hardware Co. v McCarty*, 10 Colo. Ap. 200, 50 Pac. 744.

^{105a} Remedial portions should be liberally construed. *Johnson v Halls*, 7 Alaska 638. "It seems to be the settled rule, deduced from the principles of the decisions in this state, that the statute must be strictly construed as to the parties who are entitled to the lien, and the existence of the lien must be clearly established by proof of the fact necessary to constitute the lien; but when the existence of the lien is determined, then the statute will be liberally construed as regards the subject matter to which the lien should attach, and as to the remedy for its enforcement." Also see *Deming v Wardman Constr. Co.*, 39 Fed. (2) 504, that the statute must be construed strictly in determining whether the right to the lien exists. To same general effect, see *Iannotti v Kalmbacher (Del.)* 156 Atl. 366; *Pfaff v Mason*, 103 W.Va. 318, 137 S.E. 356.

tion is proper as to the persons who may claim the lien and the kind of property to which the lien may attach;¹⁰⁶ and a liberal construction is proper of those provisions pertaining to remedies and pleading,¹⁰⁷ since they are remedial in their nature.¹⁰⁸ Nevertheless, regardless of the rule of construction applied, if a strict construction is accepted, it must not be so strict as to defeat the legislative intent.¹⁰⁹ Nor should a liberal construction be so forced as to extend the scope of the statute beyond the intent of the legislature.¹¹⁰ Nor does a liberal construction justify the destruction of the vested rights of third persons.¹¹¹

And, of course, mechanics' lien statutes are subject to the general rules of construction which apply to statutes generally.¹¹² Therefore, the statute should be construed as a whole;¹¹³ statutes in *pari materia* should be consulted;¹¹⁴ a specific provision will exclude a general provision;¹¹⁵ and the re-enactment of an old law in

¹⁰⁶ National Fireproofing Co. v Huntington, 81 Conn. 632, 71 Atl. 911; Potter Mfg. Co. v Meyer, 171 Ind. 513, 86 N.E. 837; Acme Lumber Co. v Modern Constr. Co., 214 Mich. 357, 183 N.W. 192; Nanz v Cumberland Gap Rock Co., 103 Tenn. 299, 52 S.W. 999; Morrison v State Trust Co. (Tex.) 274 S.W. 341.

¹⁰⁷ In re Republic Engineering Co. (Dela.) 130 Atl. 498; Bassett v Carpenter, 114 Kan. 828, 220 Pac. 1028; Godfrey Lumber Co. v Kline, 167 Mich. 629, 133 N.W. 528; Athens v Tarbox, 48 Minn. 13, 50 N.W. 1018; Trim v Willoughby (N.Y.) 44 How. Pr. 189; Turner v Furleigh, 124 Wash. 45, 213 Pac. 454; Francis v Hotel Rueger, Inc., 125 Va. 106, 99 S.E. 690.

¹⁰⁸ Johnson v Starrett, 127 Minn. 138, 149 N.W. 6; Dugan v Gray, 114 Mo. 297, 21 S.W. 854.

¹⁰⁹ Cada v Sack, 207 Ill. Ap. 328; Bernstein v Alcorn, 194 Iowa 1109, 190 N.W. 975.

¹¹⁰ McGuinn v Federated Mines, 160 Mo. Ap. 28, 141 S.W. 467; McDermott, Inc., v Lawyers' Mort. Co., 232 N.Y. 336, 133 N.E. 909; also see Baker v Yakima Valley Canal Co., 77 Wash. 70, 137 Pac. 342.

¹¹¹ Williams v Chapman, 17 Ill. 423; Smith v Vara, 241 N.Y.S. 202, 186 Misc. 500. The court must accept the plain language of a statute of this type as it is written. Alexander Lumber Co. v Coberg, 356 Ill. 49, 190 N.E. 99. "Materialman" and "subcontractor" are used as they are ordinarily understood. Huddleston v Nisler (Tex.) 72 S.W. (2) 959.

¹¹² Pillow v Kelley (Tenn.) 296 S.W. 11 (words and context examined).

¹¹³ Hendrickson v Bertelsen (Calif.) 35 Pac. (2) 318; J. L. Purcel v Libbey, 111 Conn. 132, 149 Atl. 225, 68 A.L.R. 1258; Kelly v Bloomingdale, 139 N.Y. 343, 34 N.E. 919.

¹¹⁴ Anderson v Walin Constr. Co., 218 Ill. Ap. 379; Brace v Gloversville, 167 N.Y. 452, 60 N.E. 779; Richardson v Lanius, 150 Tenn. 133, 263 S.W. 799.

¹¹⁵ Caldwell v Steinfeld, 294 Fed. 270.

substantially the same language of the old will carry with it the former's judicial interpretation.¹¹⁶ And retroactive effect is not necessarily improper. Such statutes have been applied to work performed or material supplied under a contract executed before the statutes were enacted.¹¹⁷ On the other hand, the destruction or impairment of a mechanic's lien is not favored by the courts,¹¹⁸ and if vested cannot be destroyed or impaired by the repeal or amendment of existing law.¹¹⁹

§ 336. Appeals.—In some jurisdictions, it is expressly provided that the right of appeal shall be exclusive and supersede all other methods of review.¹²⁰ Where this is the situation, no question arises regarding the destruction of other methods of review, but in the absence of such a statute, the authorities disagree. Some hold that other methods may still be used;¹²¹ others that they have been abrogated.¹²² And the provisions governing appeals are mandatory,¹²³ and must be complied with substantially.¹²⁴ Moreover, statutes pertaining to the right of appeal should be given a liberal

¹¹⁶ *Kelley v Northern Trust Co.*, 190 Ill. 401, 60 N.E. 585.

¹¹⁷ *Sumerlin v Thompson*, 31 Fla. 369, 12 So. 667; *Hauptmann v Catlin*, 20 N.Y. 247. Also see *Kerckhoff-Cuzner v Olmstead*, 85 Calif. 80, 24 Pac. 648. Apparently contra: *Guise v J. C. Guise, Inc.*, 116 N.J. Eq. 590, 174 Atl. 681.

¹¹⁸ *Ainslie v Kohn*, 16 Ore. 363, 19 Pac. 97; *Fitzpatrick v Boylan*, 57 N.Y. 433. Also see *Nail v McCue (Tex.)* 55 S.W. (2) 211.

¹¹⁹ *Weaver v Sells*, 10 Kan. 609; *See v Kolodny*, 227 Mass. 466, 116 N.E. 888.

¹²⁰ *Munson v Mudgett*, 14 Wash. 662, 45 Pac. 306. Similarly, where the right of appeal is conferred in certain cases, the right is impliedly denied in those not expressed. *National Exchange Bank v Peters*, 144 U.S. 570, 12 S.Ct. 767, 36 L.Ed. 545; *State v Olsen*, 39 Utah 177, 115 Pac. 968. Also note *Biggerstaff v Spaulding*, 277 Ill. Ap. 48.

¹²¹ *Carnall v Crawford County*, 11 Ark. 604; *People v Perry (N.Y.)* 16 Hun. 461; *Eppstein v Holmes*, 64 Tex. 560. The right is cumulative. *Haines v People*, 97 Ill. 161; *Henderson v Adams (Mass.)* 5 Cush. 610.

¹²² *Wideber v Superior Court*, 94 Calif. 430, 29 Pac. 870; *Lord v Pierce*, 31 Me. 420; *Bartlett v Slater*, 183 Mass. 152, 66 N.E. 631; *Keller v Walls*, 118 Mo. Ap. 384, 94 S.W. 760.

¹²³ *Brown v Kress & Co.*, 207 N.C. 722, 178 S.E. 248.

¹²⁴ *Christensen v Christensen*, 52 Utah 253, 173 Pac. 333.

construction in favor of the right, since they are remedial.¹²⁵ Accordingly, the right will not be restricted or denied unless such a construction is unavoidable.¹²⁶ In a few states, however, where the statute pertains to appeals from interlocutory orders, the rule of strict construction has been applied.¹²⁷ But, there seems to be no real justification for this departure from the general rule in accord with which a liberal construction would be given by the court. Furthermore, because of their remedial nature, statutory provisions relating to appeals may operate retrospectively in a great many instances without valid objection.¹²⁸

§ 337. Arbitration and Award.—The remedy provided by statutes of this type, as a general rule, is not an exclusive mode of arbitra-

¹²⁵ *In re Hurley*, 56 Fed. (2) 1023; *Russell v Mueller*, 332 Mo. 758, 60 S.W. (2) 48, 91 A.L.R. 705; *Pearson v Lovejoy* (N.Y.) 53 Barb. 407; *Pratley v Sherwin-Williams Co.* (Tex.) 36 S.W. (2) 195; *State v Nangle*, 82 W.Va. 224, 95 S.E. 833. Such a construction should be adopted especially when the judgment or order appealed from involves finality. *Stebbins v Friend* (Minn.) 254 N.W. 818. Conversely, a statute denying the right of appeal should be strictly construed. *Theisen v Peterson*, 114 Neb. 150, 211 N.W. 19. And a statute declaring the lower court's decision as final, has the same effect as a statute expressly prohibiting an appeal. *In re White Township School Dist.*, 300 Pa. 422, 150 Atl. 744. "Our courts recognize the rule that an appeal of a cause is a valuable right to litigants, and, in the absence of the issue of delay, the statutes and rules regulating appeals are given a liberal construction." *Harding v Raymondville* (Tex.) 58 S.W. (2) 55. Among the matters subjected to a liberal construction, are: perfecting the appeal—*Missouri, Kansas & Texas R. Co. v Thomason* (Tex.) 280 S.W. 325, the right of appeal—*Ravinowitz v Horik*, 100 Fla. 44, 129 So. 501, and the procedure on appeal—*Wall v Commonwealth Cas. Co.*, 225 Mo. Ap. 657, 39 S.W. (2) 441.

¹²⁶ *U.S. v American Bell Tel. Co.*, 159 U.S. 548, 40 L.Ed. 255, 16 S.Ct. 69; *Catterlin v Bush*, 39 Ore. 496, 59 Pac. 706, 65 Pac. 1064. Also see *Kearney County v Hapeman*, 102 Neb. 550, 167 N.W. 792. Any doubt should be resolved in favor of the right of appeal. *Bozeman v Naff*, 155 Tenn. 121, 290 S.W. 981.

¹²⁷ *Shedd v American Maize Product Co.*, 175 Ind. 86, 93 N.E. 447. The same has been held with reference to appeals from an inferior tribunal. *Hanrahan v Janesville*, 137 Wis. 1, 118 N.W. 194. Also see *Middleton v Finney* (Calif.) 6 Pac. (2) 938, 78 A.L.R. 1104.

¹²⁸ *Cassard v Tracy*, 52 La. Ann. 835, 27 So. 368. Also see § 294, *supra*.

tration.¹²⁹ But their provisions are usually mandatory and consequently must be complied with in, at least, all essential details.¹³⁰ Some authorities, however, subject the statutes to a liberal construction,¹³¹ apparently by virtue of the reasoning that such statutes are in recognition of common law procedure with reference to this remedy.¹³² Arbitration and award statutes have also been regarded as in derogation of the common law.¹³³

§ 338. **Divorce.**—Where the grounds for divorce are prescribed by statute, they seem to be exclusive of all other grounds.¹³⁴ And the power vested in the courts to grant divorces is permissive in its character.¹³⁵ Furthermore, the repeal of the court's jurisdiction, without a saving clause, will operate to terminate a pending case,¹³⁶

¹²⁹ Rankin v Rankin, 36 Ill. 293; Bunnell v Reynolds, 205 Mo. Ap. 653. Unless expressly abrogated, the parties may still pursue the common law method. Hartford Ins. Co. v Bonner Mercantile Co., 44 Fed. 151; Foust v Hastings, 66 Iowa 522, 24 N.W. 22; Wood v Tunnichliff, 74 N.Y. 38; McCune v Lytle, 197 Pa. 404, 47 Atl. 190.

¹³⁰ Wilkinson v Prichard, 145 Iowa 65, 123 N.W. 964; Inslee v Flaff, 26 N.J.L. 368.

¹³¹ Fuerst v Eichberger, 224 Ala. 31, 138 So. 409; Hopper v Fromm, 92 Kan. 142, 144 Pac. 145; Murphy v Greenberg, 246 Pa. 387, 92 Atl. 511; Bishop v Valley Falls Mfg. Co., 78 S.C. 312, 58 S.E. 939.

¹³² Ibid.

¹³³ Readdy v Tampa Elec. Co., 51 Fla. 289, 41 So. 535.

¹³⁴ Dennis v Dennis, 68 Conn. 186, 36 Atl. 34, 34 L.R.A. 449; Trenchard v Trenchard, 245 Ill. 313, 92 N.E. 243; Platner v Platner, 171 Iowa 390, 151 N.W. 205; Iring v Iring, 188 Ky. 65, 221 S.W. 219, 9 A.L.R. 1070; Franklin v Franklin, 40 Mont. 348, 106 Pac. 353; Long v Long, 77 N.C. 304; Kamp v Kamp, 59 N.Y. 212; Hammond v Hammond, 15 R.I. 40, 23 Atl. 143; Huff v Huff, 73 W.Va. 330, 80 S.E. 846. The courts will not enlarge the statutory grounds. Westfall v Westfall, 100 Ore. 224, 197 Pac. 271, 13 A.L.R. 1428. Statutory enumeration of the grounds for annulment does not impliedly exclude other grounds. Browning v Browning, 89 Kan. 98, 130 Pac. 852.

¹³⁵ Dutcher v Dutcher, 39 Wis. 651.

¹³⁶ Hunt v Hunt (N.Y.) 9 Hun. 622, aff. 72 N.Y. 217; Hicks v Hicks, 79 Wis. 465, 48 N.W. 495. But see Tufts v Tufts, 8 Utah 142, 30 Pac. 309, 16 L.R.A. 482.

although divorce statutes are generally not retrospective,¹³⁷ except, as just indicated, in so far as they relate to procedure or remedy.¹³⁸ Moreover, divorce laws should, as a general rule, be given a strict construction.^{138a}

§ 339. Set-off and Counterclaim.—Whether statutes which pertain to these items shall be construed liberally or strictly is a matter upon which the authorities also disagree. Some regard such statutes as in derogation of the common law and subject them to a strict construction.¹³⁹ Others give them a liberal construction in favor of the right of counterclaim.¹⁴⁰ The latter view is undoubtedly to be preferred, so that the legal rights of the parties

¹³⁷ *Clark v Clark*, 10 N.H. 380; *Dickinson v Dickinson*, 7 N.C. 327. Also note *McCraney v McCraney*, 5 Iowa 232, and Note; L.R.A. 1917 C 159. But statutes have been upheld which allow divorces for pre-existing causes. *Long v Long*, 135 Minn. 259, 160 N.W. 687; *Jones v Jones (Tenn.)* 2 Overt. 2. Also see *Stallings v Stallings*, 177 La. 488, 148 So. 687, that a statute shortening the period after which the unsuccessful litigant in a separate maintenance action could apply for divorce would operate retrospectively. For other retroactive statutes, see *Schuster v Schuster*, 42 Ariz. 190, 23 Pac. (2) 559 (authorizing divorce after five years' separation), *State v First Judicial Dist.*, 53 Nev. 386, 2 Pac. (2) 129, the same). A statute allowing the revision of an alimony decree is not retroactive. *White v Shalit (Me.)* 1 Atl. (2) 765.

¹³⁸ *Sparhawk v Sparhawk*, 114 Mass. 355; *Jamison v Ramsey*, 128 Mich. 315, 87 N.W. 260.

^{138a} *Floberg v Floberg*, 358 Ill. 626, 193 N.E. 456; *Garrett v State*, 118 Neb. 373, 224 N.W. 860 (being a special statute, prohibiting trial within six months after service of process), *Purdy v Purdy*, 41 Ohio Ap. 411, 179 N.E. 698 (requiring prepayment of costs, unless poverty affidavit is filed). But see *Stephenson v Stephenson*, 102 N.J. Eq. 50, 139 Atl. 721, where a statute relating to jurisdiction, being remedial, was liberally construed. Similarly, a statute authorizing the court to revive and alter the decree granting the custody of a child, being remedial, should be liberally construed to effect the legislative intent to protect the child. *Bailey v Bailey (Va.)* 200 S.E. 622.

¹³⁹ *Bradley v Smith*, 98 Mich. 449, 57 N.W. 576.

¹⁴⁰ *Champlin Refining Co. v Gasoline Products Co.*, 29 Fed. (2) 331; *Easterly v Wildman*, 87 Fla. 73, 99 So. 359; *Harshbarger v Rankin (Idaho)* 293 Pac. 327; *Collins v Campbell*, 97 Me. 23, 53 Atl. 837; *Sargent v Southgate (Mass.)* 5 Pick. 312; *Barnes v McMullins*, 78 Mo. 260; *Seibert v Dunn*, 216 N.Y. 237, 110 N.E. 447; *Smith v Young*, 109 N.C. 224, 13 S.E. 735; *McHard v Williams*, 8 S.D. 381, 66 N.W. 930; *Tidewater Quarry Co. v Scott*, 105 Va. 160, 52 S.E. 835; *Edwards v Surety Finance Co.*, 176 Wash. 534, 30 Pac. (2) 225. Such a construction is favored in order to avoid multiplicity of suits, *Manhattan Egg Co. v Seaboard Terminal Co.*, 242 N.Y.S. 189.

may be settled in one action and thus expedite the administration of justice. But, of course, a liberal construction should not be carried to extremes—to the point where injustice is more apt to occur than the conduct of litigation expedited.¹⁴¹ And in their construction, statutes relating to set-off and counterclaim should be interpreted in the light of the provisions of statutes in *pari materia*.¹⁴²

§ 340. Eminent Domain.—Statutes which relate to the power of eminent domain should be strictly construed in favor of the land owner largely because they are in derogation of common right.¹⁴³ This rule is particularly applicable where there is an alleged delegation of the power.¹⁴⁴ As a result of strict construction, the power itself must be clearly expressed by the statute,¹⁴⁵ or necessarily

¹⁴¹ Hier v Anheuser-Busch Brewing Assoc., 60 Neb. 320, 83 N.W. 77; Federal Surety Co. v Union Indemn. Co., 161 Tenn. 621, 33 S.W. (2) 421. See Mobile, etc., R. Co. v Williams, 219 Ala. 238, 121 So. 722, for definition of "sounding in damages", and Shapleigh Hdw. Co. v Brumfield, 159 Miss. 175, 132 So. 93, for "mutual indebtedness".

¹⁴² Singer Sewing Machine Co. v Burger, 181 N.C. 241, 107 S.E. 14 (counter-claim statutes should be construed with other statutes limiting amount of court's jurisdiction). Similarly, the statute of set-off must be read in connection with the practice act, Sullivan v Merchants Nat. Bank, 108 Conn. 497, 144 Atl. 34, and statutes relating to set-off and counter-claim should be construed together. Fricke v W. E. Fuettere, etc., Co., 220 Mo. Ap. 623, 288 S.W. 1000.

¹⁴³ Denson v Alabama Polytech. Inst., 220 Ala. 433, 126 So. 133; Oconee Elec. Light, etc., Co. v Carter, 111 Ga. 106, 36 S.E. 457; Harvey v Aurora Rys. Co., 228 Ill. 261, 81 N.E. 1005; Clark v Coburn, 108 Me. 26, 78 Atl. 1107; Comiskey v Lynn, 119 Mass. 210, 115 N.E. 312; Columbia School Dist. v Jones, 229 Mo. 510, 129 S.W. 705; Manda v Orange, 75 N.J.L. 251, 66 Atl. 917; People ex rel Washburn v Gloversville, 112 N.Y.S. 387, 128 Ap. Div. 44; Oswego, etc., R. Co. v Cobb, 66 Ore. 487, 135 Pac. 181; Lazarus v Morris, 212 Pa. 128, 61 Atl. 815; Paris Mountain Water Co. v Greenville, 105 S.C. 180, 89 S.E. 669; Van Valkenburgh v Ford (Tex.) 207 S.W. 405; Painter v St. Clair, 98 Va. 85, 34 S.E. 989; State v Mason, 102 Wash. 291, 173 Pac. 19; In re Condemnation of lands, 205 Wis. 299, 237 N.W. 119. For construction of statutes in derogation of common right, see *supra*, § 231.

¹⁴⁴ Southern Ill. & M. Bridge Co. v Stone, 174 Mo. 1, 73 S.W. 453, 63 L.R.A. 301.

¹⁴⁵ Western Union Tel. Co. v Atlanta, etc., R. Co., 227 Fed. 465; Waterbury v Platt, 75 Conn. 387, 53 Atl. 958, 60 L.R.A. 211; Gillette v Aurora R. Co., 228 Ill. 261, 81 N.E. 1005; State v Armell, 8 Kan. 438; Wilson v Lynn, 119 Mass. 174; Cumberland Tel., etc., Co. v Morgan, 92 Miss. 478, 45 So. 429; Litchfield v Pond, 186 N.Y. 66, 78 N.E. 719; Lloyd v Venable, 168 N.C. 531, 84 S.E. 855; In re Crescent Pipe Co., 56 Pa. Super. 201. "The estab-

implied.¹⁴⁶ This is true whether the statute confers the power on a public corporation,¹⁴⁷ or on a private corporation.¹⁴⁸ Every reasonable doubt must be resolved adversely to the power's grant,¹⁴⁹ and it may be exercised only by those donees mentioned in the statute.¹⁵⁰ In fact, it may be presumed that the legislature did not intend to confer it in the event of doubt.¹⁵¹

As in the case of the grant of the power of eminent domain, the statutes prescribing the procedure for condemnation and the assessment of damages are also in derogation of common right and of the common law and accordingly subject to a strict construction in favor of the property owner.¹⁵² For instance, a statute which pro-

lishment of the road—involves the exercise of the right of eminent domain, and in construing this statute, we must be governed by the well-established rules laid down by the authorities for the construction of such statutes. The substance of those rules seems to be that such a right may not be exercised except where the plain letter of the law permits it, and that acts conferring the right are to be strictly construed in favor of the land-owner." *Wood v Bird* (Tex.) 32 S.W. (2) 271, 273.

146 " . . . it is said that the power of expropriation must be strictly construed. The rule does not mean, however, that this right must be expressly conferred. If it appears to be conferred by 'clear implication' . . . the right may be inferred without doing violence to the doctrine requiring strict construction." *Louisiana Highway Comm. v Cormier* (La.) 128 So. 56.

147 *McCarty v Southern Pac. Co.*, 148 Calif. 211, 82 Pac. 615; *Stowe v Newborn*, 127 Ga. 421, 56 S.E. 516; *Jenks v Taunton*, 227 Mass. 298, 116 N.E. 550; *In re Brooklyn Ferry Co.*, 98 N.Y. 139; *Paris Mountain Water Co. v Greenville*, 105 S.C. 180, 89 S.E. 669; *State v Milwaukee*, 156 Wis. 549, 146 N.W. 775.

148 *Reitz v Evansville Terminal R. Co.*, 175 Ind. 707, 93 N.E. 279; *Atchinson, etc., R. Co. v Kansas City, etc., R. Co.*, 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; *Southern Ill., etc., Bridge Co. v Stone*, 174 Mo. 1, 73 S.W. 453; *Erie R. Co. v Steward*, 170 N.Y. 172, 63 N.E. 118; *Metropolitan Elec. Co. v Ganster*, 214 Pa. 628, 64 Atl. 91.

149 *Illinois Central R. Co. v Chicago, etc., R. Co.*, 122 Ill. 473, 13 N.E. 140; *Thompson v Manchester Tract. Co.*, 78 N.H. 433, 101 Atl. 212; *New York, etc., R. Co. v Kip*, 46 N.Y. 546.

150 *Ryan Lumber Co. v Ball* (Tex.) 197 S.W. 1037.

151 *Lloyd v Venable*, 168 N.C. 531, 84 S.E. 855; *Stevens Point Boom Co. v Reilly*, 44 Wis. 295.

152 *Nichols v Cleveland*, 247 Fed. 731; *Prather v Springfield*, 202 Ill. Ap. 406; *Orrick School Dist. v Dorton*, 125 Mo. 439, 28 S.W. 765; *People v Fisher*, 164 N.Y.S. 125, 98 Misc. 131; *Johnston v Delaware, etc., R. Co.*, 245 Pa. 338, 91 Atl. 618; *Reitzer v Medina Valley Irr. Co. (Tex.)* 153 S.W. 380. But if the property owner's remedy is ample, it is an exclusive remedy. *Long v Randleman*, 199 N.C. 781, 161 S.E. 534. Action for damages held exclusive, see *Campbell v Lewisberg, etc., R. Co. (Tenn.)* 26 S.W. (2) 141.

vides for the ascertainment of compensation but makes no provision for its payment, must be construed as requiring payment.¹⁵³ In fact, such an act has been held not to grant the power of eminent domain.¹⁵⁴ Similarly, the power to purchase does not grant the power to condemn.¹⁵⁵ The same is equally true with reference to the power to acquire property.¹⁵⁶

Besides being subject to a strict construction, the statutes prescribing the procedure connected with eminent domain are mandatory, and must be followed in order for the condemnation to be valid,¹⁵⁷ although some authority seems to indicate that substantial compliance will be sufficient.¹⁵⁸ Furthermore, the mode of procedure prescribed by statute for exercising the power is exclusive; as a result, no other mode of procedure can be followed.^{158a}

Where the court has a choice between a construction which favors the constitutionality of the statute pertaining to eminent domain and one which does not favor constitutionality, the former

¹⁵³ Woodruff v Glendale, 26 Minn. 78, 1 N.W. 581. Apparently contra, see Sage v Brooklyn, 89 N.Y. 189.

¹⁵⁴ Lloyd v Venable, 168 N.C. 531, 84 S.E. 855.

¹⁵⁵ Littleton v Merlin Mills, 73 N.H. 11, 58 Atl. 877; Paris Mountain Water Co v Greenville, 105 S.C. 180, 89 S.E. 669.

¹⁵⁶ Claremont R. Co. v Putney, 73 N.H. 431, 62 Atl. 727; State v King County Super. Ct., 68 Wash. 660, 124 Pac. 127. But note Deseret Water Co. v State, 167 Calif. 147, 139 Pac. 981.

¹⁵⁷ Western Union Tel. Co. v Louisville, etc., R. Co., 250 Fed. 199; Crawford v Bridgeport, 92 Conn. 431, 103 Atl. 125; Baltimore v Kane, 125 Md. 135, 93 Atl. 393; Propst v Cass County, 51 Neb. 736, 71 N.W. 748; Matter of Rochester, 92 N.Y.S. 405, 102 Ap. Div. 181; Shister v Philadelphia, 239 Pa. 468, 86 Atl. 1019. Contra: Doughty v Hope (N.Y.) 3 Den. 249.

¹⁵⁸ Florida Cent. R. Co. v Bear, 43 Fla. 319, 31 So. 287; Graves v Middleton, 137 Ind. 400, 37 N.E. 157; Durham's Appeal, 117 Me. 131, 103 Atl. 9; Kroop v Forman, 31 Mich. 144; Meyers v Williams, 199 Mo. Ap. 21, 199 S.W. 565; Seattle v Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133. "It is a general rule that he who seeks to exercise the extraordinary power of taking private property for public use must strictly follow the mode of procedure prescribed by law, although substantial compliance is sufficient." Charlestown Bridge Co. v Comstock, 36 W.Va. 263, 15 S.E. 69.

^{158a} Hopewell v Norfolk, etc., R. Co., 154 Va. 19, 152 S.E. 537.

will be accepted by the court.¹⁵⁹ And even though one part of the statute be invalid, it does not necessarily mean that the entire act will fall, for the general rule regarding partial invalidity will be applicable.¹⁶⁰ Moreover, in accord with the general rule, retroactive effect is not favored,¹⁶¹ although a repeal, without a saving clause, will terminate all pending proceedings.¹⁶² On the contrary, however, a mere change in the mode of procedure will not end the proceedings,¹⁶³ for the case may continue in accord with the new legislation.¹⁶⁴

§ 341. Death and Survival Acts.—There is some confusion in the authorities regarding the exact character of death and survival statutes. Some consider them in derogation of the common law and subject them to a strict construction.¹⁶⁵ Some seem to regard them as penal,¹⁶⁶ and others subject them to a liberal con-

¹⁵⁹ *Glasgow v Mathews*, 106 Va. 14, 54 S.E. 991.

¹⁶⁰ *Miller v Colonial Forestry Co.*, 73 Conn. 500, 48 Atl. 98; *Lentell v Boston, etc.*, R. Co., 187 Mass. 445, 73 N.E. 542; *In re Middleton*, 82 N.Y. 196.

¹⁶¹ *Balch v Detroit*, 109 Mich. 253, 67 N.W. 122; *Mundy v Fountain*, 76 N.J.L. 701, 71 Atl. 693; *Purifoy v Richmond, etc.*, R. Co., 108 N.C. 100, 12 S.E. 741.

¹⁶² *Detroit v Chapin*, 108 Mich. 136, 66 N.W. 587, 37 L.R.A. 391; *Louis v Calhoun*, 222 Mo. 44, 120 S.W. 1152.

¹⁶³ *Louis v Calhoun*, 222 Mo. 44, 120 S.W. 1152.

¹⁶⁴ *Chicago, etc.*, R. Co. v *Guthrie*, 192 Ill. 579, 61 N.E. 658.

¹⁶⁵ *Hall v Louisville, etc.*, R. Co., 157 Fed. 464; *Central of Georgia v Henison*, 121 Ga. 462; *Chicago Bridge, etc., Co. v La Mantia*, 112 Ill. Ap. 43; *Jackson v St. Louis, etc.*, R. Co., 87 Mo. 422; *Strottman v St. Louis, etc.*, R. Co., 211 Mo. 227, 109 S.W. 769; *Lubrana v Atlantic Mills*, 19 R.I. 129, 32 Atl. 205, 34 L.R.A. 797. Also see *In re Ehret's Estate*, 288 N.Y.S. 122; *Smith v State*, 266 N.Y.S. 198, 248 Ap. Div. 524, affd. 277 N.Y.S. 936, 243 Ap. Div. 682.

¹⁶⁶ *Smith v Louisville, etc.*, R. Co., 75 Ala. 449; *Raisor v Chicago, etc.*, R. Co., 215 Ill. 47, 74 N.E. 69; *Dale v Atchinson, etc.*, R. Co., 57 Kan. 601, 47 Pac. 521; *Boott Mills v Boston, etc.*, R. Co., 218 Mass. 582, 106 N.E. 680; *Gilkeson v Missouri Pacific R. Co.*, 222 Mo. 173, 121 S.W. 138. The purpose of the wrongful death statute is in part to provide a public punishment as a deterrent to negligence, in the interest of public safety. *Trugillo v Prince*, 42 N.M. 337, 78 Pac. (2) 145.

struction on the ground that they are remedial in nature.¹⁶⁷ And still others apply both the rule of strict construction and the rule of liberal construction, depending upon what phase of the act is involved.¹⁶⁸ For example, in determining the persons who will be entitled to the benefit of the statute, the court may resort to strict construction but will subject the act to a liberal construction in its application in such persons favor.¹⁶⁹ A great deal can be said in support of any of these several authorities and the view taken by each. Nevertheless, such statutes would surely seem remedial in so far as they provide a remedy where none previously existed,¹⁷⁰ yet, they are penal to the extent that they punish the wrongdoer.¹⁷¹ Perhaps, after all, the true test of the nature of the statute must depend upon its chief object,¹⁷² except where it

¹⁶⁷ *Stewart v Baltimore, etc., R. Co.*, 168 U.S. 445, 18 S.Ct. 105, 42 L.Ed. 537; *White v Atchison, etc., R. Co.*, 125 Kan. 537, 265 Pac. 73, 59 A.L.R. 749; *Albrecht v Potthoff*, 192 Minn. 557, 257 N.W. 377, 96 A.L.R. 395; *Ghilain v Courure*, 84 N.H. 48, 146 Atl. 395, 65 A.L.R. 553. "The statute creates a new cause of action unknown to the common law. The act is designed to correct what, according to modern views, was a manifest defect in the common law, and, notwithstanding it is in derogation thereof, the remedial nature of the act is such as to call for a liberal construction. The paramount object of the legislation is to benefit the designated beneficiaries. The medium of enforcement is secondary. Conceding that the provision designating the person who shall bring the action is a limitation of the right, it does not follow therefrom that a strict construction must be applied in determining the person in whom the legislature intended to invest the right." *Ghilain v Couture*, 84 N.H. 48, 146 Atl. 395, 65 A.L.R. 553. The policy of the wrongful death statute is remedial and not punitive. *Wilder v Charleston Transit Co. (W.Va.)* 197 S.E. 814.

¹⁶⁸ *Whittlesey v Seattle*, 94 Wash. 645, 163 Pac. 193; also see *Gilkeson v Missouri Pacific R. Co.*, 222 Mo. 173, 121 S.W. 138. Also note *Betz v Kansas City Southern Ry Co.*, 314 Mo. 390, 284 S.W. 455, that since the statute clearly indicates the legislative intent, it neither calls for a strict or liberal construction.

¹⁶⁹ *Whittlesey v Seattle*, 94 Wash. 645, 163 Pac. 193.

¹⁷⁰ *Daury v Ferraro*, 108 Conn. 386, 143 Atl. 630, 62 A.L.R. 1323. This is also indication that the statute is in derogation of the common law. See cases under note 165, *supra*.

¹⁷¹ *Marshall v Wabash R. Co.*, 46 Fed. 269; *Denver, etc., R. Co. v Frederick*, 57 Colo. 90, 140 Pac. 463.

¹⁷² If its main object is to offer actual compensation, it is remedial. *Denver, etc., R. Co. v Frederick*, 57 Colo. 90, 140 Pac. 463; *Boyd v Fitchburg R. Co.*, 67 Vt. 76, 30 Atl. 687. If such purpose is to impose a fine or penalty, it is penal. See *Marshall v Wabash R. Co.*, 46 Fed. 269.

has several objects of equal prominence. In this latter event, the better view might be concerned only with seeing that the legislative objects are effectively carried out. But even where a liberal construction is applied by the court, the statute should not be extended beyond its obvious import.¹⁷³ And in the event the court has to select between two interpretations, the one which is clear is to be preferred over one which is uncertain.¹⁷⁴ All of the sections of the statute must be construed together,¹⁷⁵ and recourse to statutes in *pari materia* is proper in the court's effort to ascertain the legislative intention.¹⁷⁶

A number of words or expressions used in death and survival statutes have been subjected to construction. Among some of the more interesting ones, we find that "parent, child, or dependent relative" includes illegitimate children;¹⁷⁷ that "driver" of a stage coach is not a technical word but will include anyone driving such coach whether employed by the owner or not;¹⁷⁸ that "children" includes both minors and adults living in the household;¹⁷⁹ that "widow" is synonymous with "wife";¹⁸⁰ that dependent step-children are included in the term "children";¹⁸¹ that the word "parent" means either the father or mother;¹⁸²

¹⁷³ *Potter v Petcoff*, 122 Pa. Super. 540, 186 Atl. 320. That a mother for a child born dead, see *Youman v McConnell*, 7 La. Ap. 515.

¹⁷⁴ *Safford v Drew*, 10 N.Y. Super. 627.

¹⁷⁵ *Coleman v Hyer*, 113 Ga. 420, 38 S.E. 962; *Safford v Drew*, 10 N.Y. Super. 627. The statute should also be construed in light of the prior common law. *Cummins v Kansas City Pub. Service Co.*, 334 Mo. 672, 66 S.W. (2) 920.

¹⁷⁶ *Jacksonville Electric Co. v Bowden*, 54 Fla. 461, 45 So. 755.

¹⁷⁷ *In re Wenkhous' Estate*, 286 N.Y.S. 518, 158 Misc. 663. But not a step-mother. *Bourdreaux (Tex.)* 87 S.W. (2) 641.

¹⁷⁸ *Wallace v Woods (Mo.)* 102 S.W. (2) 91.

¹⁷⁹ *Pennsylvania R. Co. v Adams*, 55 Pa. 499. But see *Vining v Rexford*, 201 Fed. 904.

¹⁸⁰ *Georgia R., etc., Co. v Garr*, 57 Ga. 277, 24 Am. Rep. 492. And widow means lawful widow. *Molz v Hansell*, 115 Pa. Super. 338, 175 Atl. 880.

¹⁸¹ *Newark Paving Co. v Klotz*, 85 N.J. 432, 91 Atl. 91, aff. 86 N.J.L. 695, 92 Atl. 1087.

¹⁸² *Scott v Central R. Co.*, 77 Ga. 450.

that the term "next of kin" usually means blood relations;¹⁸³ and "lineal heir" will include the father.¹⁸⁴ On the other hand, the word "person" does not include a town;¹⁸⁵ "children" will not include grandchildren;¹⁸⁶ and "next of kin" will not include adopted children.¹⁸⁷ An examination of the various cases will, however, reveal considerable variance in the scope and meaning of the same word or term. Of course, this is to be expected on account of the disagreement as to the nature of the statutes themselves.

The usual rule that statutes will not be given retroactive operation,¹⁸⁸ applies to statutes relating to wrongful death.¹⁸⁹ As a result, the right of recovery depends upon the law in force at the time the death occurs.¹⁹⁰ Accordingly, if no damages are allowed for the deceased person's suffering, a statute enacted after such person's death providing for the recovery of such damages is inapplicable.¹⁹¹ Yet in spite of the rule against retroactive operation, if the legislative intent clearly makes the statute retroactive, it must be given that effect regardless of the consequences.¹⁹² And in this connection, it should be noted that statutes pertaining to the mode of procedure under the death statute will ordinarily apply to pending litigation.¹⁹³ This, of course, is

¹⁸³ *Heidcamp v Jersey City, Etc., R. Co.*, 69 N.J.L. 284, 55 Atl. 239.

¹⁸⁴ *Willis Coal Co. v Grizzell*, 198 Ill. 313, 65 N.E. 74.

¹⁸⁵ *Chase v Inhabitants of Litchfield (Me.)* 182 Atl. 921.

¹⁸⁶ *Walker v Vicksburg, etc., R. Co.*, 110 La. 718, 34 So. 749.

¹⁸⁷ *Heidcamp v Jersey City, etc., R. Co.*, 69 N.J.L. 284, 55 Atl. 239. *Contra*: *Omaha Water Co. v Schamel*, 147 Fed. 502. And see *Louisville, etc., R. Co. v Noble's Admx.*, 234 Ky. 504, 28 S.W. (2) 733, that the word "dependent" refers only to next of kin.

¹⁸⁸ See § 277, *supra*.

¹⁸⁹ *Winfree v Northern Pac. R. Co.*, 173 Fed. 65; *Davis v Central R. Co.*, 147 Mich. 479, 111 N.W. 76; *Quinn v Chicago, etc., R. Co.*, 141 Wis. 497, 124 N.W. 653.

¹⁹⁰ *Kelley v Boston, etc., R. Co.*, 135 Mass. 448; *Drake v Gilmore*, 52 N.Y. 389; *Slate v Fort Worth (Tex.)* 193 S.W. 1143.

¹⁹¹ *Ingersoll v Detroit, etc., R. Co.*, 163 Mich. 268, 128 N.W. 227.

¹⁹² *Atchison, etc., R. Co. v Napole*, 55 Kan. 401, 40 Pac. 669.

¹⁹³ *Sackheim v Pigueron*, 215 N.Y. 62, 109 N.E. 109.

in accord with the rule applicable to procedural statutes generally.¹⁹⁴ Furthermore, the problem of retroactive operation frequently arises where existing statutes are repealed, expressly or by implication. But repeals by implication are not favored,¹⁹⁵ so that a general statute providing for actions for wrongful death will not necessarily be repealed by the enactment of workmen's compensation acts,¹⁹⁶ and similar laws.¹⁹⁷ Moreover, if a repealing act re-enacts the repealed act, in the same or substantially the same terms, the law in its effectiveness continues uninterrupted.¹⁹⁸

§ 342. Workmen's Compensation.—The decisions are not uniform regarding the nature of the construction to which workmen's compensation acts should be subjected. The difference, however, seems to arise from the view taken by the court of the statute or statutes which make up the compensation act. Where the legislation is regarded as remedial, the rule of liberal construction in favor of the employee is applied.¹⁹⁹ Where the legislation is held in derogation of the common law, the rule of strict con-

¹⁹⁴ See § 285, *supra*.

¹⁹⁵ See § 310, *supra*.

¹⁹⁶ See *Lester v Otis Elev. Co.*, 155 N.Y.S. 524, 169 Ap. Div. 613. But, of course, the compensation act may exclude all other remedies. *Faber v Industrial Comm.*, 352 Ill. 155, 185 N.E. 255; *Simon v Cadillac Motorcar Co.*, 242 Mich. 93, 218 N.W. 663; *Barnhart v American Concrete Steel Co.*, 227 N.Y. 531, 125 N.E. 675.

¹⁹⁷ *Chiara v Stewart Min. Co.*, 24 Idaho 473, 135 Pac. 245; *Midwest Nat. Bank, etc., Co. v Davis*, 288 Mo. 563, 233 S.W. 406.

¹⁹⁸ *Florida Cent., etc., R. Co. v Foxworth*, 41 Fla. 1, 25 So. 338.

¹⁹⁹ *Baltimore, etc., Steamboat Co. v Norton*, 284 U.S. 408, 76 L.Ed. 366, 52 S.Ct. 187; *Fox v Fafnir Bearing Co.*, 107 Conn. 189, 130 Atl. 778, 58 A.L.R. 861; *W. J. Newman Co. v Industrial Comm.*, 353 Ill. 190, 187 N.E. 137; *Foster v Congress Square Hotel Co.*, 128 Me. 50, 145 Atl. 400, 67 A.L.R. 239; *Ransdell v International Shoe Co.*, 329 Mo. 47, 44 S.W. (2) 1; *Ridenour v Lewis*, 121 Neb. 823, 238 N.W. 745, 80 A.L.R. 1249; *Industrial Comm. v Ahren*, 119 Ohio St. 41, 162 N.E. 272; *Mobley v Brown*, 151 Okla. 167, 2 Pac. (2) 1034; *Cain v State Industrial Comm.*, 149 Ore. 29, 37 Pac. (2) 353; *Scott County School Bd. v Carter*, 156 Va. 815, 159 S.E. 115, 83 A.L.R. 229; *Esque v Huntington*, 104 W.Va. 110, 139 S.E. 469; *Johnson v Lumber Co.*, 203 Wis. 304, 234 N.W. 506.

struction is followed.²⁰⁰ Workmen's compensation acts are undoubtedly in derogation of the common law, and if that characteristic is emphasized, the acts are properly subjected to a strict construction. But the remedial character would seem to be the most important characteristic. Such being true, workmen's compensation laws should be given a liberal construction in the light of their purposes or objects,²⁰¹ and the evils which they were intended to remove.²⁰² In fact, a number of workmen's compensation acts contain express statutory provisions that the construction thereof shall be liberal.²⁰³

A liberal construction is one which will operate to give the law its fullest reasonable scope,²⁰⁴ and effectively eradicate the

²⁰⁰ *Vaughan's Seed Store v Simonini*, 275 Ill. 477, 114 N.E. 163; *Andrejwski Wolverine Coal Co.*, 182 Mich. 298, 148 N.W. 684; *Millers' Mut. Cas. Co. v Hoover (Tex.)* 235 S.W. 863. "The difficulty in the present case arises from a failure to recognize the workmen's compensation act as an instrument intended to effectuate certain purposes in derogation of the common law, where the latter had been found inadequate to accomplish that purpose. As it is in derogation of the common law, it must receive a strict construction, but not such a construction as would in any way fetter its humane purposes." *Zimmer v Casey*, 296 Pa. 529, 146 Atl. 130, 131. And see *Luyk v Hertel*, 242 Mich. 445, 219 N.W. 721, that the common law rules of law and procedure do not apply, and especially where the act provides a complete and unambiguous rule. *Ellinger v Wolf House, etc., Co.*, 337 Mo. 9, 85 S.W. (2) 11. Also see *Brooks v Davis & Co.*, 124 Okla. 140, 254 Pac. 66.

²⁰¹ *Aetna Life Ins. Co. v Windham*, 53 Fed. (2) 984; *Dowery v State*, 84 Ind. Ap. 37, 149 N.E. 922; *Roberts v Ottawa*, 101 Kan. 228, 165 Pac. 869; *Slavinsky v Nat. Bottling Co.*, 267 Mass. 319, 166 N.E. 821; *Jensen v Southern Pac. R. Co.*, 215 N.Y. 514, 109 N.E. 600; *Lesh v Illinois Steel Co.*, 163 Wis. 124, 157 N.W. 539; *Goble v Clinch Lumber Co. (Va.)* 127 S.E. 175.

²⁰² *Bowman v Industrial Comm.*, 289 Ill. 126, 124 N.E. 373; *Crooke v Farmers Mutual Hail Ass'n*, 206 Iowa 104, 218 N.W. 513, 62 A.L.R. 342. Also note *State v District Ct.*, 134 Minn. 131, 158 N.W. 798, where the history and conditions surrounding passage were considered.

²⁰³ *Marsh v Industrial Acc. Comm.*, 217 Calif. 338, 18 Pac. (2) 933, 86 A.L.R. 563; *Murray's Case*, 130 Me. 181, 154 Atl. 352; *McDaniel v Eagle Coal Co.*, 99 Mont. 309, 43 Pac. (2) 655, 99 A.L.R. 1492. Such a provision would seem to indicate that the act should not be unnecessarily restricted by a technical construction of the words used therein, but rather that such words be construed in the broader, popular sense. *Drecksmit v Universal Car-loading Co. (Mo.)* 18 S.W. (2) 86.

²⁰⁴ *Village of Kiel v Industrial Comm.*, 163 Wis. 441, 158 N.W. 68.

evils it was intended to obviate.²⁰⁵ But, as in the case of every statute subject to a liberal construction,²⁰⁶ a liberal construction does not justify the creation of liabilities,²⁰⁷ or the inclusion within the act's scope of matters clearly not intended by the legislature,²⁰⁸ by a strained construction. On the contrary, the language of the act should be given its usual and ordinary meaning,²⁰⁹ and an absurd,²¹⁰ harsh,²¹¹ or oppressive²¹² construction avoided.

The cases are filled with illustrations of instances wherein the courts have applied the rule of liberal construction, and obviously it is impossible to go into them in any great detail. A few examples, however, will give some indication of the manner in which the courts have construed the various workmen's compensation acts. For instance, the word "widow" has been given its usual and ordinary meaning—a married woman whose husband is dead;²¹³ an orphan has been construed to refer to minor dependant chil-

²⁰⁵ *Foth v Macomber*, 161 Wis. 549, 154 N.W. 369.

²⁰⁶ For liberal construction, generally, see § 224, *supra*.

²⁰⁷ *Morris & Co. v Industrial Comm.*, 295 Ill. 49, 128 N.E. 727; *Bosquer v Howe Scale Co.*, 96 Vt. 364, 120 Atl. 171; *Clingan v Carthage Ice Co.*, 223 Mo. Ap. 1064, 25 S.W. (2) 1084 (interpolation).

²⁰⁸ *McDonald v New Haven*, 94 Conn. 403, 109 Atl. 176, 10 A.L.R. 193; *White v Eastern Mfg. Co.*, 120 Me. 62, 112 Atl. 841; *Stoerzer v N.Y.*, 267 N.Y. 339, 196 N.E. 281.

²⁰⁹ *Shockley v King*, 31 Dela. 606, 117 Atl. 280; *Crooke v Farmers Mut. Hail Ass'n*, 206 Iowa 104, 218 N.W. 513, 62 A.L.R. 342; *In re Madden*, 222 Mass. 487, 111 N.E. 379; *Stradar v Stern Bros.*, 172 N.Y.S. 482, 184 Ap. Div. 700; *Marsh v Groner*, 285 Pa. 473, 102 Atl. 127; *Fogle v Common.*, 101 Pa. Super 412; *Carmichael v Mahan Motor Co.*, 157 Tenn. 613, 11 S.W. (2) 672.

²¹⁰ *Oliphant v Hawkinson*, 192 Iowa 1259, 183 N.W. 805, 33 A.L.R. 1433; *Workmen's Comp. Bd. v U.S. Coal & Coke Co.*, 196 Ky. 833, 245 S.W. 900; *Hartford Acc. & Ind. Co. v State Industrial Comm. (Okla.)* 209 Pac. 775; *Mellen Lumber Co. v Industrial Comm.*, 154 Wis. 114, 142 N.W. 187.

²¹¹ *Baltimore & Phila. Steamboat Co. v Norton*, 284 U.S. 408, 76 L.Ed. 366, 52 S.Ct. 187. But hardship alone does not justify stretching the law beyond the limits fixed by the legislature. *Di Donato v Rosenberg*, 263 N.Y. 486, 189 N.E. 560.

²¹² *Karoly v Industrial Comm.*, 65 Colo. 239, 176 Pac. 284. Also see *Gordon v Amoskeag Mfg. Co.*, 83 N.H. 221, 140 Atl. 704.

²¹³ *Lewis v Department of Labor and Industry (Wash.)* 70 Pac. (2) 298.

dren; ²¹⁴ a relief worker has been held to be an employee; ²¹⁵ a hospital intern has also been considered an employee; ²¹⁶ a convict or prisoner engaged in labor has been regarded as an employee for compensation purposes; ²¹⁷ and a night watchman who was employed by several persons at a specified sum per night has been held not to be an independent contractor. ²¹⁸ A "workman" has been held to be synonymous with "employee," ²¹⁹ and a "servant" and an "employee" have been construed to be the same. ²²⁰ On the other hand, a partner has been held not to be an employee, ²²¹ and the illegitimate children of a deceased employee's surviving wife not to be step-children. ²²²

Naturally, the only justification for the construction of a workmen's compensation statute, is to ascertain the true meaning and intent of the legislature. ²²³ As may be gathered from what we have already stated, the general rules for the construction of statutes may be used in ascertaining that intent. ²²⁴ For instance, the statute must be construed as a whole, ²²⁵ an absurd consequence will be avoided, if possible, ²²⁶ the history of the law may be re-

²¹⁴ *Sands v Brock Candy Co. (Tenn.)* 101 S.W. (2) 1113.

²¹⁵ *Industrial Comm. v McWhorter*, 129 Ohio St. 40, 193 N.E. 620, 96 A.L.R. 1150. *Contra: Vaivida v Grand Rapids*, 264 Mich. 204, 249 N.W. 826, 88 A.L.R. 707.

²¹⁶ *Bernstein v Beth Israel Hospital*, 236 N.Y. 268, 140 N.E. 694, 30 A.L.R. 598.

²¹⁷ *Calif. Highway Comm. v Industrial Acc. Comm.*, 200 Calif. 44, 251 Pac. 808, 49 A.L.R. 1377.

²¹⁸ *Sargent v Knowlson Co.*, 224 Mich. 868, 195 N.W. 810, 30 A.L.R. 993.

²¹⁹ *Storm v Thompson*, 185 Iowa 308, 170 N.W. 403, 20 A.L.R. 658. But see *Europe v Addison Amusements, Inc.*, 231 N.Y. 105, 131 N.E. 750.

²²⁰ *Press Pub. Co. v Industrial Acc. Comm.*, 190 Calif. 114, 210 Pac. 820. But see *Shannon v Western Indemn. Co. (Tex.)* 257 S.W. 522, that the word "employee" is more comprehensive.

²²¹ *Dezendorf v Nat. Casualty Co. (La.)* 171 So. 160.

²²² *Sharp v Vineland*, 118 N.J.L. 567, 194 Atl. 260. Also note *Hargrove v Lloyds Cas. Co. (Tex.)* 66 S.W. (2) 466.

²²³ *Wilson v Dorflinger*, 218 N.Y. 84, 113 N.E. 454.

²²⁴ *Victory Sparkler Co. v Gilbert*, 160 Md. 181, 153 Atl. 275; *McVey v Chesapeake, etc., Tel. Co.*, 103 W.Va. 519, 138 S.E. 97.

²²⁵ *Workmen's Comp. Exch. v Chicago, etc., R. Co.*, 45 Fed. (2) 885; *Lombard College v Industrial Comm.*, 294 Ill. 548, 128 N.E. 553; *Comstock's Case*, 129 Me. 467, 152 Atl. 618; *Post v Burger*, 216 N.Y. 544, 111 N.E. 351; *Wick v Gunn (Okla.)* 169 Pac. 1087.

²²⁶ *Uphoff v Industrial Board*, 271 Ill. 312, 111 N.E. 128.

ferred to,²²⁷ contemporaneous circumstances examined,²²⁸ due weight given to administrative interpretations,²²⁹ and the decisions of the courts other states may be resorted to for assistance.²³⁰

Workmen's compensation acts, however, should not be construed to apply to injuries sustained before their enactment.²³¹ Nor should the provisions of an amendment be construed as applicable to injuries sustained before its passage.²³² Nevertheless, although the foregoing may be laid down as the general rule, retrospective operation is not objectionable where the alteration in existing law merely relates to remedy or procedure as contrasted to a substantial right or duty.²³³ In accord with this principle, the time within

²²⁷ *State v District Court*, 134 Minn. 131, 158 N.W. 798. Moreover, the report of a legislative drafting committee has been resorted to for assistance. *Pellett v State Industrial Comm.*, 162 Wis. 596, 156 N.W. 956. Resort to the legislative journal is likewise proper. *Murray Hospital v Angrove*, 92 Mont. 101, 10 Pac. (2) 577.

²²⁸ *Camunas v New York, etc., Co.*, 260 Fed. 40; *In re Boyer*, 65 Ind. Ap. 408; *Foth v Macomber, etc., Rope Co.*, 161 Wis. 549, 154 N.W. 369.

²²⁹ *Ginnocchio v Hydraulic Press Brick Co.*, 266 Fed. 564; *Murray Hospital v Angrove*, 92 Mont. 101, 10 Pac. (2) 577; *State ex rel Bettman v Christen*, 29 Ohio N.P.N.S. 448; *Wendt v Industrial Comm.*, 80 Wash. 111, 141 Pac. 311. Similarly, the opinion of the attorney general is entitled to careful consideration. *City of Tyler v Texas Employers' Ins. Assn. (Tex.)* 288 S.W. 409.

²³⁰ *Widdoes v Laub*, 33 Dela. 4, 129 Atl. 344. But the weight and value of such decisions will depend upon the similarity of the language of the acts involved. *Uphoff v Industrial Board*, 271 Ill. 312, 111 N.E. 128.

²³¹ *State Acc. Fund v Jacobs*, 140 Md. 622, 118 Atl. 159, 24 A.L.R. 434; *Manley's Case*, 280 Mass. 331, 182 N.E. 486; *State v Gen. Acc. Assur. Corp.*, 134 Minn. 21, 158 N.W. 715; *Arnold v S. R. Mfg. Co.*, 203 N.Y.S. 546, 208 Ap. Div. 305; *Bahlkow v Preston (S.D.)* 244 N.W. 93; *In re Hibler*, 37 Wyo. 332, 261 Pac. 648. And note the discussion of the construction of statutes creating new liabilities, § 250, *supra*.

²³² In this connection, see case of *Wamboldt*, 265 Mass. 300, 163 N.E. 910; *Kirchner v Michigan Sugar Co.*, 206 Mich. 459, 173 N.W. 193.

²³³ *Otis Elevator Co. v Industrial Comm.*, 302 Ill. 90, 134 N.E. 19; *Crew v Trainor*, 91 N.J.L. 87, 107 Atl. 905; *Orton v Olds Motor Works*, 240 N.Y.S. 570, 229 Ap. Div. 46; *New Amsterdam Cas. Co. v Patton (Tex.)* 22 S.W. (2) 540, *aff.* 36 S.W. (2) 1000.

which the claim must be filed,²³⁴ the time for the hearing on the claim,²³⁵ and matters pertaining to appeals from awards made by the compensation commission,²³⁶ will all depend upon the law in force when the prescribed act is done.²³⁷ Conversely, the amount of the award,²³⁸ questions of dependency,²³⁹ and provisions relating to the notice of injury to the employer,²⁴⁰ relate to substantial rights and consequently should depend upon the law in effect at the time the accident occurs.

§ 343. Descent and Distribution.—In the construction of the statutes of descent and distribution, the general rules of construction will be utilized by the courts.²⁴¹ As in the case of all statutes, the sole legitimate object of construction is to ascertain the legislative intention.²⁴² In order to discover that intention, where it is in doubt or ambiguous, statutes in *pari materia*, such as those which pertain to dower, curtesy and homestead rights, and even the com-

²³⁴ *Duquoin v Industrial Comm.*, 329 Ill. 543, 161 N.E. 108; *Crew v Trainor*, 91 N.J.L. 87, 102 Atl. 905.

²³⁵ *Devine's Case*, 236 Mass. 588, 129 N.E. 414; *Williams v Thompson*, 203 N.C. 717, 166 S.E. 906.

²³⁶ *People v McGoorty*, 270 Ill. 610, 110 N.E. 791; *Rish v Iowa Portland Cement Co.*, 186 Iowa 443, 170 N.W. 532; *Corpora v Kansas City P. S. Co.*, 129 Kan. 690, 284 Pac. 818; *Thomas v Pennsylvania R. Co.*, 162 Md. 509, 160 Atl. 793.

²³⁷ See *Rish v Iowa-Portland Cement Co.*, 186 Iowa 443, 170 N.W. 532; *Ahmed's Case*, 278 Mass. 180, 179 N.E. 684, 79 A.L.R. 669; *Tackett v State Comp. Comr.*, 108 W.Va. 438, 151 S.E. 307.

²³⁸ *Preveslin v Derby, etc., Co.*, 112 Conn. 129, 151 Atl. 518, 70 A.L.R. 1246; *American Chain Co. v Salters*, 80 Ind. Ap. 410, 140 N.E. 435; *Blatchley v Dairymen's League*, 232 N.Y.S. 437, 225 Ap. Div. 167.

²³⁹ *Collwell v Bedford Stone Co.*, 73 Ind. Ap. 344, 126 N.E. 439; *Hansen v Flinn-O'Rourke Co.*, 183 N.Y.S. 213, 192 Ap. Div. 878.

²⁴⁰ *Schmidt v Baking Co.*, 90 Conn. 217, 96 Atl. 963.

²⁴¹ *Jones v Dexter*, 8 Fla. 276; *In re Miller Estate*, 117 Ore. 399, 244 Pac. 526 (ejusdem generis); *Wooley v Shell Petro. Co.*, 39 N.M. 256, 45 Pac. (2) 927 (plain language is not to be varied on equitable grounds); *Hite v Hite (Mass.)* 17 N.E. (2) 176 (a literal interpretation will not be given where it conflicts with other sections).

²⁴² *Williams v Wessels*, 94 Kan. 71, 145 Pac. 856; *Riggs v Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340; *In re Gwynn*, 239 Pa. 238, 86 Atl. 789.

mon law, may be consulted.²⁴³ The latter may be looked to for assistance because most of the American statutes on descent and distribution are modeled after the common law, although much of it has been discarded as unfitted to our institutions.²⁴⁴

A great many of the words or expressions generally found in the statutes of descent have been judicially interpreted. Reference to a number of such words or terms will indicate how the courts have subjected them to construction. For instance, the word "heir" in its primary meaning has been held to refer to the person appointed by law to succeed to the estate in case of intestacy.²⁴⁵ It has also been construed to designate distributees,²⁴⁶ and to mean next of kin.²⁴⁷ In turn, the word "kin" and "kinship" are generally considered as denoting persons related by blood.²⁴⁸ "Heirs at law" when used with reference to personalty means personal representatives or next of kin,²⁴⁹ and "lawful representatives" includes and means legal heirs where real property is involved.²⁵⁰ The word "children" has been held to include illegitimate children,²⁵¹ but not grandchildren.²⁵²

In the construction of statutes of descent and distribution, the court is not justified in creating exceptions not clearly or necessarily expressed,²⁵³ although irreconcilable conflict of a later enactment with an existing one will work an implied repeal of the

²⁴³ *Trulove v Trulove*, 172 Ind. 441, 86 N.E. 1018. But see *Dickinson's Appeal*, 42 Conn. 491, that the common meaning rather than the common law meaning should be given to the words used in the statute of descent.

²⁴⁴ *Ector v Grant*, 112 Ga. 557, 37 S.E. 984; *Crane v Reeder*, 21 Mich. 24; *Prescott v Carr*, 29 N.H. 453. Is it not more accurate to say that each state has established its own laws on the subject? *Bates v Brown (U.S.)* 5 Wall. 710, 18 L.Ed. 535; *Smallman v Powell*, 18 Ore. 367, 23 Pac. 249; *Finley v Brown*, 122 Tenn. 316. Also see *Wall v Pfanschmidt*, 265 Ill. 180, 106 N.E. 785, that the civil law is the basis of most American statutes.

²⁴⁵ *Himmell v Himmell*, 294 Ill. 557, 129 N.E. 64.

²⁴⁶ *Welberding v Miller*, 88 Ohio St. 609, 106 N.E. 665; *Quinn v Hall*, 37 R.I. 56, 91 Atl. 71.

²⁴⁷ *Quinn v Hall*, 37 R.I. 56, 91 Atl. 71.

²⁴⁸ *In re Stoler*, 293 Pa. 433, 143 Atl. 121, 59 A.L.R. 1402.

²⁴⁹ *Cotton v Cotton*, 166 Tenn. 420, 61 S.W. (2) 655.

²⁵⁰ *Conley v Jamison*, 205 Iowa 1326, 219 N.W. 485. Also see *Larkins v Routson*, 115 Ohio St. 639, 155 N.E. 227.

²⁵¹ *Hastings v Rathbone*, 194 Iowa 177, 188 N.W. 960, 23 A.L.R. 392.

²⁵² *Lowrey v LeFlore*, 48 Okla. 235, 149 Pac. 1112.

²⁵³ *Collins v Metropolitan L. Ins. Co.*, 232 Ill. 37, 83 N.E. 542.

latter.²⁵⁴ Nor will the court give retrospective effect to laws pertaining to descent unless clearly required,²⁵⁵ although there is no objection to such operation where the statute is merely remedial.²⁵⁶ Moreover, if remedial, the statute will be entitled to a liberal construction.²⁵⁷

§ 344. Married Women's Acts.—So far as their construction is concerned, acts of this character do not now occupy the important place they formerly did. Most of the statutes pertaining to the separate property of married women have been in effect long enough to have their interpretations fairly well established. Suffice it to say, in this discussion, that the authorities are not uniform as to the nature of the construction to which they have been subjected. Where the acts have been regarded as remedial or enabling, they have been liberally construed.²⁵⁸ Where they have been held in derogation of the common law, they have been strictly construed.²⁵⁹ An analysis of the various decisions, however, reveals that the type of construction seems to depend upon what feature of the statute is involved—if the remedy, the act should be given a liberal construction—if an abrogating provision, it should be strictly construed.²⁶⁰ But whether this be a correct conclusion or not, if a strict construction is to be applied by the court, the statute cannot be extended beyond the classes or property clearly specified.²⁶¹ Nor should statutes relating to the separate property

²⁵⁴ *State v Guinotte* (Mo.) 204 S.W. 806; *In re Gwynn*, 239 Pa. 238, 86 Atl. 789.

²⁵⁵ *Rock Hill College v Jones*, 47 Md. 1. In other words, the law in force at the time of deceased's death determines who shall inherit the property. *Mostilla v Ash*, 234 Ala. 626, 176 So. 356; *In re Rattray's Estate* (Calif.) 82 Pac. (2) 625.

²⁵⁶ *Meller v Davis*, 106 Mich. 300, 64 N.W. 338; *Fitzpatrick v Simonson* 86 Minn. 140, 90 N.W. 378.

²⁵⁷ *Fitzpatrick v Simonson*, 86 Minn. 140, 90 N.W. 378; *In re Marchant*, 121 Wis. 526, 99 N.W. 320. That statutes of descent abrogate the common law, see *Copenhaver v Pendleton*, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324.

²⁵⁸ *Moore v Darby*, 6 Dela. Ch. 193, 18 Atl. 768; *Chicago, etc., R. Co. v Dunn*, 52 Ill. 260; *Burr v Swann*, 118 Mass. 588; *Farmers Exchange Bank v Hageluku*, 165 Mo. 443, 65 S.W. 728.

²⁵⁹ *Cook v Meyer*, 73 Ala. 580; *Junction R. Co. v Harris*, 9 Ind. 184; *Weller v Thompson*, 85 Ill. 197; *Fitzgerald v Quann*, 109 N.Y. 441, 17 N.E. 354; *Mayo v Gleason Bank*, 140 Tenn. 423, 205 S.W. 125.

²⁶⁰ *Quilty v Bathe*, 135 N.Y. 201, 32 N.E. 47, 17 L.R.A. 521.

²⁶¹ *Gordon v Gordon*, 183 Mo. 294, 82 S.W. 11.

of married women be given a retroactive operation, unless clearly required by the language, and especially where vested rights will be impaired.²⁶² On the other hand, if the statute relates solely to procedure or in no manner affects vested rights, retroactive effect is generally unobjectionable.²⁶³

§ 345. Foreclosure.—In the absence of a statutory provision to the contrary, the method of foreclosure provided for by statute, is not an exclusive method,²⁶⁴ but on the contrary cumulative.²⁶⁵ But retroactive effect will not be given to a statute which makes the statutory method exclusive by destroying all previous methods of foreclosure so as to apply to mortgages existing before the passage of the exclusive method, unless clearly required by the statute's language.²⁶⁶ Nevertheless, if the new law merely regulates the procedure of existing methods of foreclosure, the new enactment may operate retroactively.²⁶⁷ Similarly, a curative statute which corrects defective foreclosures is unobjectionable,²⁶⁸ unless the foreclosure was absolutely void.²⁶⁹ And since the procedure incident to the foreclosure of mortgages is not in derogation of the common law, the statutes which prescribe such procedure

²⁶² *Bynum v Johnston*, 222 Fed. 659; *Fowler v Fowler*, 138 Ky. 326, 127 S.W. 1014; *Mathis v Melton* (Mo.) 238 S.W. 806; *Hetzel v Lincoln*, 216 Pa. St. 60, 64 Atl. 866.

²⁶³ *Williams v King*, 23 Fed. Cas. No. 17,725; *Bruce v Bruce*, 95 Ala. 563, 11 So. 197.

²⁶⁴ *Furbish v Sears*, 9 Fed. Cas. No. 5,160; *De Lay v Latimer*, 155 Ga. 463, 117 S.E. 446; *Mason v Barnard*, 36 Mo. 384.

²⁶⁵ *Mutual Bldg. & Loan Assoc. v Corum* (Calif.) 38 Pac. (2) 793.

²⁶⁶ *Galusha v Meserve*, 58 Calif. Ap. 174, 208 Pac. 348; *Fisher v Green*, 142 Ill. 80, 31 N.E. 172; *Webb v Lewis*, 45 Minn. 285, 47 N.W. 803; *Jenkins v Griffin*, 175 N.C. 184, 95 S.E. 166.

²⁶⁷ *Scott v Barnes County*, 115 N.D. 259, 107 N.W. 61.

²⁶⁸ *Johnson v Peterson*, 90 Minn. 503, 97 N.W. 384.

²⁶⁹ *Finlayson v Peterson*, 5 N.D. 587, 67 N.W. 953, 33 L.R.A. 532.

will be liberally construed, in favor of the mortgagor.^{269a}

§ 346. **Redemption.**—Redemption statutes are remedial in nature and hence are to be liberally construed,²⁷⁰ in favor of the redemptioner,²⁷¹ and so as to effect their beneficent purpose,²⁷² especially where no injury will follow such a construction.²⁷³ All doubt will be resolved in favor of the right to redeem,²⁷⁴ and no right connected therewith will be considered taken away except by strict compliance with the requirements necessary therefor.²⁷⁵ Even so, in accord with the general rule of law, retroactive operation of redemption statutes is not favored by the courts.²⁷⁶ But redemption statutes have been held to be in derogation of the common law and therefore properly subject to a strict construction,²⁷⁷

^{269a} *Wright v Wimberly*, 94 Ore. 1, 184 Pac. 740. But see *Wilkinson v Federal Land Bank*, 168 Miss. 645, 150 So. 218; err. dis. 168 Miss. 645, 151 So. 716. And since the foreclosure statute is in derogation of the common law, it should be strictly construed. *Algrod v Bayerl* (N.J.) 160 Atl. 504. Also see *Tice v Tice*, 208 Iowa 145, 224 N.W. 571, that foreclosure statutes are to be construed in the light of their purpose and the power conferred includes everything necessary to such purpose. Moreover, moratorium statutes, should be liberally construed in the mortgagor's favor, as they are designed as a shield for his protection and not as a device for dispossessing him. *Siegel v Atterbury*, 5 N.Y.S. (2) 372, 254 Ap. Div. 514. Yet a statute authorizing a continuance in foreclosure proceedings is permissive and not mandatory. *Mosher v Young* (Ariz.) 75 Pac. (2) 1037.

²⁷⁰ *Whiteman v Taber*, 205 Ala. 319, 87 So. 353; *Bozarth v Largent*, 128 Ill. 95, 21 N.E. 218; *Rambeck v LaBree*, 156 Minn. 310, 194 N.W. 643; *North Dakota Horse, etc., Co. v Serumgard*, 17 N.D. 466, 117 N.W. 453; *Dipple v Meville*, 82 Mont. 280, 267 Pac. 214. Right to redeem is an "asset". In *re Nossman*, 22 Fed. Supp. 645.

²⁷¹ *Tomasko v Cotton* (Minn.) 273 N.W. 628. And especially to protect him from a deficiency judgment. *Meurer v Kimel*, 267 N.Y.S. 799, 150 Misc. 113.

²⁷² *Crawford v Horton*, 234 Ala. 439, 175 So. 310; *Mutual Bldg. & Loan Ass'n v Willing* (Wis.) 267 N.W. 297.

²⁷³ *Caribelli v Caribelli*, 266 Ill. Ap. 453.

²⁷⁴ *Danenhauer v Dawson*, 65 Ark. 129, 46 S.W. 131, 44 L.R.A. 193.

²⁷⁵ *Caro v Wollenberg*, 68 Ore. 420, 136 Pac. 866.

²⁷⁶ *Malone v Roy*, 134 Calif. 344, 66 Pac. 313; *Patterson Land Co. v Merchants Nat. Bank*, 55 N.D. 90, 212 N.W. 512; *Aldridge Hotel Co. v Mainard*, 171 Okla. 422, 43 Pac. (2) 738.

²⁷⁷ *Wolf v Schlichting* (N.J.) 161 Atl. 840; *Hansen v Day*, 99 Ore. 387, 195 Pac. 344. But see *Anderson v Hill*, 191 Minn. 414, 254 N.W. 585 (mortgage moratorium).

particularly as to the persons included.²⁷⁸ This view, however, is not generally accepted.

§ 347. **Uniform State Laws.**—The Uniform Negotiable Instruments Act,²⁷⁹ the Uniform Warehouse Receipts Act,²⁸⁰ and, in fact, all of the uniform acts, should be interpreted and construed so as to effect their general purpose to make uniform the law of the states which adopt them. As has been stated with reference to the Uniform Warehouse Receipts Act, they should be interpreted in the light of the legislative intent to make the act universal in its application.²⁸¹ In a general way, these acts amount to a codification of the law on the subject,²⁸² as established by the weight of authority.²⁸³

Obviously, the general rules of statutory construction are usually applicable to uniform laws.²⁸⁴ For instance, the words used in the act should be given their ordinary and natural meaning;²⁸⁵ all the sections should be construed together,²⁸⁶ and the decisions

²⁷⁸ *Hervey v Krost*, 116 Ind. 268, 19 N.E. 125. The same has been held with reference to the time for redemption. *Fort Wayne Builders' Supply Co. v Pfeiffer*, 60 Ind. Ap. 615, 111 N.E. 192.

²⁷⁹ *Union Trust Co. v McGinty*, 212 Mass. 205, 98 N.E. 679; *Continental Sav. Bank v Elliott*, 166 Wash. 283, 6 Pac. (2) 638.

²⁸⁰ *City Nat. Bank of Decatur v Nelson*, 218 Ala. 90, 117 So. 681, 61 A.L.R. 938; *Mason v Exporters & Traders Compress Co. (Tex.)* 94 S.W. (2) 758.

²⁸¹ *Ibid.* Also see § 236, *supra*.

²⁸² *American Bank v McCombs*, 105 Va. 473, 54 S.E. 14.

²⁸³ *Campbell v Cincinnati Fourth Nat. Bank*, 137 Ky. 555, 126 S.W. 114.

²⁸⁴ *Lowell Co-op. Bank v Sheridan*, 284 Mass. 594, 188 N.E. 636, 91 A.L.R. 1176; *Peter v Finzer*, 116 Neb. 380, 217 N.W. 612.

²⁸⁵ *Union Trust Co. v McGuinty*, 212 Mass. 205, 98 N.E. 679. Also see cases under note 284, *ibid.*

²⁸⁶ *Campbell v Fourth National Bank*, 137 Ky. 362, 125 S.W. 74.

of other states resorted to for assistance,²⁸⁷ even though not uniform.²⁸⁸ Moreover, the law merchant may be referred to for assistance in ascertaining the meaning of doubtful words.²⁸⁹ But it is not proper for the court to construe one uniform act in connection with another; they should be construed separately.²⁹⁰ They are not in *pari materia*. Some decisions seem to regard the uniform acts as declaratory of the common law,²⁹¹ and others as in derogation of the common law, so that they will be strictly construed against those who seek relief thereunder.²⁹² It is suggested, however, that the type of construction should depend upon the nature of the provision susceptible to construction.

§ 348. Statute of Frauds.—The authorities are in conflict as to whether the statute of frauds should be given a strict or a liberal construction. Where the statute is regarded as in derogation of the common law, it has been strictly construed,²⁹³ but the trend

²⁸⁷ Union Trust Co. v McGuinty, 212 Mass. 205, 98 N.E. 679; Record v Rochester Trust Co. (N.H.) 192 Atl. 177, 110 A.L.R. 1218; Forgan v Smedal (Wis.) 234 N.W. 896. As has been said with reference to the Uniform Sales Act, they should be construed in accord with the construction placed on such acts in other states. International Milling Co. v North Platte Flour Mills (Neb.) 229 N.W. 22; Hutchinson v Renner, 28 Ohio Ap. 22, 162 N.E. 453; Stewart v Hanson, 62 Utah 281, 218 Pac. 959, 44 A.L.R. 340. Also see Record v Rochester Trust Co. (N.H.), *supra*, that the Negotiable Instruments Act is legislation within the policy of country-wide uniformity, which requires that construction of such legislation in other states be treated and receive authority as a part of their body of unwritten law. And obviously, the decisions of the state from which the act was adopted is entitled to consideration. Stadler v Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111. Even the English sales act may be referred to. Ward v Great Atlantic, etc., Co., 231 Mass. 90, 120 N.E. 225, 5 A.L.R. 242.

²⁸⁸ Holliday v Hoffman, 85 Kan. 71, 116 Pac. 239.

²⁸⁹ Wettlauger v Baxter, 137 Ky. 362, 125 S.W. 74. And if the uniform act is silent, the law merchant will apply. Bryant State Bank v Mitchell (S.D.) 275 N.W. 262.

²⁹⁰ Bankers Capitol Furn. Co. v Hall, 11 N.J. Misc. 13, 163 Atl. 556.

²⁹¹ See Kirby v Gibson Refrig. Co., 274 Mich. 395, 264 N.W. 840. Also see Interstate Banking & Trust Co. v Brown, 235 Fed. 32. For application of liberal construction, see Kershaw v Booth, 177 Ill. Ap. 117.

²⁹² Dayton Scale Co. v General Market Co., 248 Ill. Ap. 279.

²⁹³ Selva v Talbott, 175 Ind. 648, 95 N.E. 114; Upton Mill, etc., Co. v Baldwin Flour Mills, 147 Minn. 205, 179 N.W. 904. Also see Box v Standord, 21 Miss. 93; Kratzer v Day, 12 Fed. (2) 724.

seems to favor subjecting it to a liberal construction.²⁹⁴ This latter view is undoubtedly proper where the statute of frauds is regarded as procedural.²⁹⁵ And the statute is generally regarded by the courts as a most beneficial one which should be liberally construed to effect that object.²⁹⁶ Consequently, a construction should be avoided, if possible, which will operate to continue the evils aimed to be remedied by the statute of frauds.²⁹⁷

A number of words or phrases commonly used in the various statutes of frauds have been interpreted by the courts. They are generally indicative of the liberal attitude of the courts. Thus, the word "person" will include a corporation;²⁹⁸ the word "upon" has been construed to be "thereupon";²⁹⁹ and the expression "not to be performed" is regarded as permissive.³⁰⁰ And in seeking to ascertain the meaning of the statute of frauds, where it has been adopted from the law of England, the English statute may be considered.³⁰¹

§ 349. Statutes of Limitations.—At one time there was a tendency upon the part of the courts to look with disfavor upon statutes of limitations and to subject them to a strict construction.³⁰²

²⁹⁴ *Breckinridge v Crocker*, 78 Calif. 529, 21 Pac. 179; *Wilson v Bevans*, 58 Ill. 232; *Oakman v Rogers*, 120 Mass. 214; *Haeberle v O'Day*, 61 Mo. Ap. 395; *Farrell v Mentzer*, 102 Wash. 629, 174 Pac. 482. And note *Richardson Press Co. v Albright*, 224 N.Y. 497, 121 N.E. 362, and *Maule v Bucknell*, 50 Pa. 39.

²⁹⁵ *Kingsley v Cousins*, 47 Me. 91. That it is a procedural statute, see *Levi v Murrell*, 63 Fed. (2) 670.

²⁹⁶ *Hartley v Sandford*, 66 N.J.L. 627, 50 Atl. 454, 55 L.R.A. 206; *Nugent v Wolfe*, 111 Pa. St. 471, 4 Atl. 15; also see *Upton Mill, etc., Co. v Baldwin*, 147 Minn. 205, 179 N.W. 904. The statute's purpose is to remove temptation to perjury and to protect innocent parties from the consequences thereof. *Leytham v McHenry*, 209 Iowa 692, 228 N.W. 639.

²⁹⁷ *Pratt v Miller*, 109 Mo. 78, 18 S.W. 965. Also see *Stauffer v Hulwick*, 176 Ind. 410, 96 N.E. 154, that the statute should be strictly construed in so far as it affords protection to fraud. And see Note in 9 A.L.R. 537.

²⁹⁸ See Note; 20 Ann. Cas. 741.

²⁹⁹ *Walker v Russell*, 186 Mass. 69, 71 N.E. 86.

³⁰⁰ *Arkansas Midland R. Co. v Whitley*, 54 Ark. 199, 15 S.W. 465.

³⁰¹ *Westheimer v Peacock*, 2 Iowa 528.

³⁰² *Musgrave v McManus*, 24 N.M. 227, 173 Pac. 196. Also see *Crocker v Ireland*, 252 N.Y.S. 631, rev. 256 N.Y.S. 638.

Today, however, such statutes are generally liberally construed.³⁰³ But the court will not give them a strained construction in order to avoid their intended effect,³⁰⁴ nor create an exception where none exists,³⁰⁵ regardless of the nature of the exception.³⁰⁶ In fact, the language should be given its ordinary meaning,³⁰⁷ the statute construed as a whole,³⁰⁸ and effect fully given to every part.³⁰⁹ And in ascertaining the meaning of the legislature, the court may properly resort to the punctuation,³¹⁰ to the section headings,³¹¹ to statutes

³⁰³ *Mendini v Milner*, 47 Idaho 439, 276 Pac. 313; *Warren v Clemenger*, 120 Ill. Ap. 435; *Patterson v Peaslee-Gaubert Co.*, 174 Ky. 47, 191 S.W. 670; *State v Yates*, 231 Mo. 276, 132 S.W. 672; *Valente v Goggiano*, 107 N.J.L. 456, 154 Atl. 817; *Gibbs v Lester (Tex.)* 41 S.W. (2) 164; *United Security Life Ins. Co. v Massey*, 159 Va. 832, 164 S.E. 529, 167 S.E. 248. But a short statute of limitations has been subjected to a strict construction. *St. Louis, etc., R. Co. v Batesville, etc., Tel. Co.*, 86 Ark. 300, 110 S.W. 1047. Such statutes are also liberally construed in the government's favor in actions against the government. *W. P. Brown & Sons v Burnet*, 282 U.S. 283, 75 L.Ed. 343, 51 S.Ct. 140. But statutes of limitations do not apply to the government, unless made expressly applicable, *U.S. v Seaboard Air Line Ry. Co.*, 22 Fed. (2) 113, or even to a city where strictly public rights are involved. *Clokey v Wabash Ry. Co.*, 353 Ill. 349, 187 N.E. 475. As a result, so far as a municipality is concerned, a strict construction in favor of the city is not required where proprietary rights are involved. *Ebell v Baker*, 137 Ore. 427, 299 Pac. 313. And a statute saving an action from the bar of limitations, being remedial, is also entitled to a liberal construction. *Bryant v Mulder*, 163 Tenn. 600, 45 S.W. (2) 48.

³⁰⁴ *Union Tool Co. v Farmers, etc., National Bank*, 192 Calif. 40, 218 Pac. 424.

³⁰⁵ *Swicard v Bailey*, 3 Kan. 507; *Hamner v Yazoo Delta Lumber Co.*, 100 Miss. 349, 56 So. 466; *Collins v Pease*, 146 Mo. 135, 47 S.W. 925; *Texas & P. Ry. Co. v Ward County Irr. Dist. (Tex.)* 257 S.W. 333; *Johnson v Merritt*, 125 Va. 162, 99 S.E. 785.

³⁰⁶ *Butler v Craig*, 27 Miss. 628; *Gibson v Jensen*, 48 Utah 244, 158 Pac. 426. And so, statutes of limitations which make exceptions in favor of persons under disability are strictly construed. *Anderson v Mace*, 99 Mont. 421, 45 Pac. (2) 771. Moreover, the enumeration of specific exceptions impliedly excludes all others. *Kenyon v Electric R. Co.*, 51 R.I. 90, 151 Atl. 5.

³⁰⁷ *Borchert v Bash*, 37 Neb. 593, 150 N.W. 830; *Wren v Dixon*, 40 Nev. 170, 161 Pac. 722, 167 Pac. 324.

³⁰⁸ *Patterson v Peaslee-Gaubert Co.*, 174 Ky. 47, 191 S.W. 670. Also see *Sproat v Hall*, 189 Mich. 28, 155 N.W. 361.

³⁰⁹ *Salomon v Pioneer Co-operative Co.*, 21 Fla. 374; *Orman v Van Arsdell*, 12 N.M. 344, 78 Pac. 48, 67 L.R.A. 438.

³¹⁰ *Mooney v Camden Iron Works*, 83 N.J.L. 32, 83 Atl. 770.

³¹¹ *Cytron v St. Louis Transit Co.*, 205 Mo. 700, 104 S.W. 109.

in *pari materia*,³¹² to the legislative history,³¹³ and, where the statute has been adopted, to the construction of the state of adoption.³¹⁴ It is also proper for the court to consider the effect or the suggested construction.³¹⁵ Where this is done, a construction which favors the legality of the statute will be preferred by the court over one which results in the statute's illegality;³¹⁶ a construction which results in an absurd or unjust result will not be accepted, unless the language clearly requires its acceptance;³¹⁷ and retroactive effect will not be given to statutes of limitations, unless such is clearly the legislative intention.³¹⁸

In the event there is a conflict between two periods of limitation, the court will usually apply the one establishing the longest period.³¹⁹ Similarly, where a general statute of limitations applies to many instances but conflicts with a statute which applies to a particular case, the specific statute controls,³²⁰ even though the general statute provides for a longer period.³²¹ And where the statute fails to embrace certain cases, it will be presumed that such cases are not subject to the period of limitation prescribed by the

³¹² *Cliff v Seligman*, 38 Fed. (2) 179; *Arend v Mylander*, 39 Ohio Ap. 277, 177 N.E. 377.

³¹³ *Platt v Carter*, 187 Iowa 777, 174 N.W. 786; *Brinckerhoff v Bostwick*, 99 N.Y. 185, 1 N.E. 663; *Pietsch v Wegart*, 178 Wis. 498, 190 N.W. 616.

³¹⁴ *Lambertson v Grant*, 94 Me. 508, 48 Atl. 127; *Borchert v Bash*, 97 Neb. 593, 150 N.W. 830; *Olatmanns v Glenn*, 78 Okla. 70, 188 Pac. 886.

³¹⁵ *Jennings v Lowery & Berry*, 147 Miss. 673, 112 So. 692; *Adams, etc., Co. v Kenoyer*, 17 N.D. 302, 116 N.W. 98.

³¹⁶ *Bonfils v Public Utilities Comm.*, 67 Colo. 563, 189 Pac. 775; *People v Simon*, 176 Ill. 165, 52 N.E. 910; *Harrison v Harman*, 76 W.Va. 412, 85 S.E. 646.

³¹⁷ See § 177, *supra*.

³¹⁸ *Payne v Ostrus*, 50 Fed. (2) 1039, 77 A.L.R. 531; *Landers v Smith*, 78 Me. 212, 3 Atl. 463; *Harrison v Harman*, 76 W.Va. 412, 85 S.E. 646.

³¹⁹ *McCormick v Eliot*, 43 Fed. 469; *George v George*, 250 Ill. 251, 95 N.E. 167; *Norris v Tripp*, 111 Iowa 115, 82 N.W. 610; *Burnes v Simpson*, 9 Kan. 658; *Carpenter v Hadley*, 118 Me. 437, 108 Atl. 679; *State v General Acc., etc., Assur. Corp. (Minn.)* 158 N.W. 715; *Tice v Fleming*, 173 Mo. 49, 72 S.W. 689; *Hall v Brennan*, 140 N.Y. 409, 35 N.E. 663; *Sample v London, etc., Ins. Co.*, 46 S.C. 491, 24 S.E. 334; *Hanford v King County*, 112 Wash. 659, 192 Pac. 1013.

³²⁰ *Sutton v Hancock*, 118 Ga. 436, 45 S.E. 504; *Orzem v McNeill*, 103 Kan. 429, 175 Pac. 633, 3 A.L.R. 1598; *Clark v Kansas City, etc., R. Co.*, 219 Mo. 524, 118 S.W. 40.

³²¹ *Orzem v McNeill*, 103 Kan. 429, 175 Pac. 633, 3 A.L.R. 1598; *Virtue v Creamery Package Co.*, 123 Minn. 17, 142 N.W. 930.

statute.³²² This is especially true with reference to the government, for statutes of limitations do not bind the sovereign without express words of inclusion.³²³

We have already indicated that statutes of limitations do not operate retrospectively, unless clearly required to do so by virtue of their language.³²⁴ In fact, it will be presumed that they are intended to operate prospectively only.³²⁵ Nevertheless, such statutes will often have retroactive effect by virtue of express language or by necessary implication.³²⁶ As a result, existing and pending causes of action may be effected,³²⁷ the length of the period may be altered;³²⁸ or a period established where none previously existed.³²⁹ Where retroactive effect is given, it is only equitable that a reasonable period be allowed before the effective date of the statute so far as causes of actions antedating its passage are concerned.³³⁰ Indeed, the failure to provide for such a period has been held indicative of the legislative intent that the statute should not operate retrospectively.³³¹ And where a cause of action has become barred

³²² *Clark v Kansas City, etc., R. Co.*, 219 Mo. 524, 118 S.W. 40; *Berner v Walker*, 116 N.Y.S. 615, 63 Misc. 262.

³²³ *Dollar Savings Bank v U.S. (U.S.)* 19 Wall. 227, 22 L.Ed. 80; *Whittemore v People*, 227 Ill. 453, 81 N.E. 427. Also see *People v Baldwin*, 188 N.Y.S. 542, 197 Ap. Div. 285, and note 303, *supra*.

³²⁴ See § 285, *supra*.

³²⁵ *Clark v Kansas City, etc., R. Co.*, 219 Mo. 524, 118 S.W. 40.

³²⁶ *Henricks v Davenport Locomotive Works*, 203 Iowa 1395, 214 N.W. 585; *Acker v Acker*, 81 N.Y. 143.

³²⁷ *Sohn v Waterson (U.S.)* 17 Wall. 596, 21 L.Ed. 737; *McEntire v Brown*, 28 Ind. 347.

³²⁸ *Crothers v Edison Electric Co.*, 149 Fed. 606; *Heath v Hazelip*, 159 Ky. 555, 167 S.W. 905; *Carson v Norfolk, etc., R. Co.*, 128 N.C. 95, 38 S.E. 287.

³²⁹ *Gridley v Barnes*, 103 Ill. 211.

³³⁰ See § 285, *supra*.

³³¹ *Winkleman v Des Moines, etc., Levee Dist.*, 171 Mo. Ap. 49, 153 S.W. 539. And see *Cronheim v Loveman*, 225 Ala. 199, 142 So. 550, that statutes of limitations, being remedial, an amendment thereto may operate retroactively, provided such is the clear legislative intent, and a reasonable time is allowed after enactment for those affected to assert their rights. Also note *People v Cohen*, 245 N.Y. 419, 157 N.E. 515, that statutes of limitation are not retroactive, unless expressly so declared, even though a reasonable time is allowed between the passage and the effective date. And a statute shortening the period of limitation is not presumed to be prospective, if it allows a reasonable interval after enactment. *E. S. Parks Shellac Co. v Jones*, 265 Mass. 108, 163 N.E. 883.

under an existing statute of limitations, it will not be revived except where the language of the latter enactment clearly requires it.³³²

Numerous words and phrases appearing in statutes of limitations have been construed by the courts. Illustrative of the court's attitude, the phrase "has arisen in another State" has been construed not to apply to a state through which the debtor may pass or reside before coming into the state where the action is instituted against him;³³³ the word "arisen" and the word "accrues" are generally regarded as synonymous;³³⁴ the phrase "out of the state" will apply equally to a resident of the state who has been absent as well as to a person who has always resided out of the state;³³⁵ and the word "hereafter," found in an amendment to a statute of limitations, has been regarded as strong evidence that it operates *in futuro*.³³⁶

§ 350. Pensions.³³⁷—Pension statutes should be liberally con-

³³² Hopkins v Lincoln Trust Co., 233 N.Y. 213, 135 N.E. 267. Also note Richards v Carpenter, 261 Fed. 724; Bowman v Cockrill, 6 Kan. 190; Kinsman v Cambridge, 121 Mass. 553; Dennig v Meckfessel (Mo.) 261 S.W. 55; Henson v Slaughter Co. (Tex.) 206 S.W. 375. Some states seem to deny this power of revival completely. School Dist. v Blodgett, 155 Ill. 441, 40 N.E. 1025, 31 L.R.A. 70; Dunbar v Boston, etc., R. Co., 181 Mass. 383, 63 N.E. 916; Eingartner v Illinois Steel Co., 103 Wis. 373, 79 N.W. 433.

³³³ West v Theis, 15 Idaho 167, 96 Pac. 932.

³³⁴ Bruner v Martin, 76 Kan. 862, 93 Pac. 165. "Actions for debt" does not mean common law actions for debt literally. Rose v Bank (Tex.) 59 S.W. (2) 810.

³³⁵ Ruggles v Keeler (N.Y.) 3 Johns. 263.

³³⁶ McMahon v Arnold, 94 N.Y.S. 775, 107 Ap. Div. 132.

³³⁷ For origin of Federal Pension System, see Note; 7 A.L.R. 1344. And for validity of certain pension acts, see Veterans Welfare Board v Riley, 189 Calif. 159, 208 Pac. 678, 22 A.L.R. 1531 (to soldiers and their families); People v Westchester County Nat. Bank, 231 N.Y. 465, 132 N.E. 241, 15 A.L.R. 1344; Busser v Snyder, 282 Pa. St. 440, 128 Atl. 80, 37 A.L.R. 1515 (act held valid notwithstanding it was socialistic); Denver, etc., R. Co. v Grand County, 51 Utah 294, 170 Pac. 74, 3 A.L.R. 1224 (Mothers' Pension). Also see Baltimore v Fuget, 164 Md. 335, 165 Atl. 618, 88 A.L.R. 1058, where a mothers' pension act was held to be a public and not a public local law. For construction of pension acts, generally, see Note, 88 A.L.R. 1069. That the Old Age Assistance Act is not a pension act as its benefits are not based on age alone. State ex rel Eckroth v Borge (N.D.) 233 N.W. 521.

strued in favor of the intended beneficiaries.³³⁸ As a result, the literal terms of the statute do not need to be followed since it is the spirit of the statute that controls its interpretation.³³⁹ Accordingly, the word "children" will include grandchildren,³⁴⁰ and illegitimate children where the parents marry and recognize the child as their own.³⁴¹ But the rule that pension acts shall be given a liberal construction is not without exception. Penal provisions will be given a strict construction.³⁴²

It has been held that the establishment by statute of a pension is not to be construed retrospectively so as to confer benefits,³⁴³ nor retrospectively so as to include a deduction from the pension granted.³⁴⁴ And in accord with the general rule, a person does not acquire a vested right to a pension, so that it may not be lessened or wholly taken away.³⁴⁵ Nevertheless, the right to a pension—whether it be public or private—may under certain circumstances become vested. It will where the right accrues by virtue of a contract of employment entered into and continued by the beneficiary.³⁴⁶ And so far as any payments due, the beneficiary cer-

³³⁸ *Walton v Cotton* (U.S.) 19 How. 355, 15 L.Ed. 658; *Logue v Fenning*, 29 Ap. D.C. 519; *O'Dea v Cook*, 176 Calif. 659, 169 Pac. 366; *Price v Society for Sav.*, 64 Conn. 362, 30 Atl. 139; *State ex rel Holton v Tampa*, 119 Fla. 556, 159 So. 292, 98 A.L.R. 501; *People v Oak Park Firemen's Pension Fund*, 220 Ill. Ap. 242; *Dahlin v Missouri Comm. for Blind* (Mo.) 262 S.W. 420; *Yates County National Bank v Carpenter*, 119 N.Y. 550, 23 N.E. 1108.

³³⁹ *Yates County National Bank v Carpenter*, 119 N.Y. 550, 23 N.E. 1108.

³⁴⁰ *Walton v Cotton* (U.S.) 19 How. 355, 15 L.Ed. 658.

³⁴¹ *U.S. v Skam*, 27 Fed. Cas. No. 16,308.

³⁴² *Ballew v U.S.*, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388; *U.S. v Nice-wonger*, 20 Fed. 438. "Penalty", "forfeiture" and "liability" held synonymous with "punishment", see *U.S. v Reiseinger*, 128 U.S. 398, 9 S.Ct. 99, 32 L.Ed. 840. "Purposely" must be given its ordinary meaning—intentionally, designedly, expressly. *Alabama Pension Comm. v Helms* (Ala.) 170 So. 649, cert. den. 170 So. 651.

³⁴³ *U.S. v Alexander* (U.S.) 12 Wall. 177, 20 L.Ed. 381.

³⁴⁴ *Reynolds v U.S.*, 292 U.S. 443, 78 L.Ed. 1253, 54 S.Ct. 800 (deduction for board at hospital already incurred prior to the enactment of a statute forbidding such deduction).

³⁴⁵ *U.S. v Teller*, 107 U.S. 64, 2 S.Ct. 39, 27 L.Ed. 352; *Buetel v Foreman*, 288 Ill. 106, 123 N.E. 270; *In re Snyder*, 93 Wash. 59, 160 Pac. 12 (mother's pension). Also see *Lynch v U.S.*, 292 U.S. 571, 78 L.Ed. 1134, 54 S.Ct. 840. Pensions are usually bounties which may be given, withheld or recalled at the discretion of the legislature. *Abbott v Morgenthau*, 93 Fed. (2) 242.

³⁴⁶ *State ex rel Holton v Tampa*, 119 Fla. 556, 159 So. 292, 98 A.L.R. 501.

tainly has a vested right thereto.³⁴⁷ The right to a pension should also be regarded as vested where the intended beneficiary, either voluntarily or involuntarily, contributes toward the pension.³⁴⁸ This should be true whether the pension is a public or private one, or one totally supported by the contributions of the intended beneficiaries or maintained by taxation. The recipient of the pension under these circumstances is not simply the recipient of charity. One may not acquire a vested right to be supported by charity but the right to a pension maintained in whole or in part by the beneficiary's contributions rests upon a quasi-contractual consideration.³⁴⁹

It would, therefore, seem that any statute which provides for the creation of a public pension system, whether it pertain to old age, disability, or unemployment benefits, if the intended beneficiary contributes towards its creation or maintenance, should be given a liberal construction in favor of the beneficiary. Statutes of this type have as their primary purpose the relief of the intended beneficiaries from suffering and want, and if such statutes are to operate effectively, they should be construed so as to promote and spread their humane purpose. Harsh and technical constructions should obviously be avoided. Only where the pension is purely a bounty can a strict construction against the intended or apparent beneficiary, be justified, although even here the tendency is decidedly in favor of liberality.^{349a}

§ 351. Poor Laws—Relief, Etc.—At common law only a moral duty existed to support the poor and needy,³⁵⁰ but today it is not

³⁴⁷ *Pennie v Reis*, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426; *Gibbs v Minneapolis, etc., Relief Ass'n*, 125 Minn. 174, 145 N.W. 1075.

³⁴⁸ See *Stevens v Minneapolis F. Dept. Relief Ass'n*, 124 Minn. 381, 145 N.W. 35, where it was held that the beneficiary could not arbitrarily be deprived of any part of the pension, except that which he did not contribute.

³⁴⁹ *State ex rel Holton v Tampa*, 119 Fla. 556, 159 So. 292, 98 A.L.R. 501. But note *Ruth v Wellington (Pa.)* 32 D. & C. 657.

^{349a} See *Price v State Social Security Comm. (Mo. Ap.)* 121 S.W. (2) 298; *Moore v State Social Security Comm. (Mo. Ap.)* 122 S.W. (2) 391; *Conant v State (Wash.)* 84 Pac. (2) 378. But note *State ex rel Eckroth v Borge (N.D.)* 283 N.W. 521.

³⁵⁰ *Patrick v Baldwin*, 109 Wis. 342, 85 N.W. 274, 53 L.R.A. 613.

only a public³⁵¹ but a statutory duty as well.³⁵² To a certain extent, our poor laws are modeled after the English law.³⁵³ And not being considered remedial, they are subject to a strict construction, as a result of which, their scope is not to be extended by construction.³⁵⁴ In other words, the statutes which provide for the support of the poor should not be extended by implication; at least, no further than is absolutely necessary to effect the purpose of the legislation.³⁵⁵ As a result, no person will be entitled to public assistance, unless he comes clearly within the scope of the law.³⁵⁶ Nevertheless, several cases subject statutes of this type to a liberal construction so as to effectuate the benevolent purpose of such legislation.³⁵⁷ Undoubtedly, the humane and benevolent purpose can be much better carried out where the act is subject to a liberal construction. It would seem far better that the spirit of the act should control its strict letter, particularly in cases of dire distress.

But regardless of the nature of the construction given to relief statutes, they should not be construed to operate retroactively, unless such is the clear and certain intent of the legislature.³⁵⁸

³⁵¹ *State v Osawkee Township*, 14 Kan. 418. That the care of handicapped and underprivileged persons is a responsibility of the state, see *Conant v State* (Wash.) 84 Pac. (2) 378.

³⁵² *Patrick v Baldwin*, 109 Wis. 342, 85 N.W. 274, 53 L.R.A. 613; *Cerro Gordo County v Boone County*, 152 Iowa 692, 133 N.W. 132; *State ex rel Gilpin v Smith* (Mo.) 96 S.W. (2) 40.

³⁵³ *Heidleberg v Lynn* (Pa.) 5 Whart. 430. But see *Common. v Hunt* (Mass.) 4 Metc. 111, that the poor laws of England did not become a part of the state law since they were not adapted to our conditions.

³⁵⁴ *Cerro Gordo County v Boone County*, 152 Iowa 692, 133 N.W. 132; *Patrick v Baldwin*, 109 Wis. 342, 85 N.W. 274, 53 L.R.A. 613.

³⁵⁵ *Morristown v Hardwick*, 81 Vt. 31, 69 Atl. 152.

³⁵⁶ *Wood v Boone County*, 153 Iowa 92, 133 N.W. 377; *Soper v Wheeler*, 239 Mass. 327, 132 N.E. 46; *Miller v Tucker*, 142 Miss. 146, 105 So. 774; *Shelley v Mo. Comm. for Blind*, 309 Mo. 612, 274 S.W. 688; *Gilligan v Grattan*, 63 Neb. 242, 88 N.W. 477; *Lander County v Humboldt County*, 21 Nev. 415, 32 Pac. 849; *Roane v Hutchinson County*, 40 S.D. 297, 167 N.W. 168; *Ogden City v Weber County*, 26 Utah 129, 72 Pac. 433.

³⁵⁷ *Beach v Marion Tp.*, 2 Ohio Dec. (Reprint) 221; *Ogden City v Weber County*, 26 Utah 129, 72 Pac. 433. Also see Note, Ann. Cas. 1913 C 82. And note *Frankel v Goldstein*, 280 N.Y.S. 191, 155 Misc. 531. But the penal provisions should be strictly construed. *Risner v State ex rel Martin*, 55 Ohio Ap. 151, 9 N.E. (2) 151.

³⁵⁸ *Stone v Stone*, 32 Conn. 142; *Augusta v Waterville*, 106 Me. 394, 76 Atl. 707; *Worcester v Barre*, 138 Mass. 101; *Clark's Appeal*, 186 Mich. 300, 152 N.W. 920.

Relief legislation is primarily intended to take care of the immediate needs of indigent persons rather than to cover incidents and matters which are past. Nor will statutes which are intended to care for the poor be repealed by implication,³⁵⁹ unless such is the clear intent of the legislature.³⁶⁰

It is not always easy to determine whether relief statutes are mandatory or not. Naturally, in order to ascertain whether their provisions must be followed, the usual tests are applicable.³⁶¹ It would seem, however, that considerable discretion should be afforded those whose duty it is to administer the legislation.³⁶² But when a needy person comes clearly within the provisions of the law, he should receive the relief prescribed.

As may be gathered from the foregoing, the general rules of construction applicable to statutes generally will apply to relief laws.³⁶³ As an example, statutes in *pari materia* may be resorted to for assistance where the meaning of the relief statute is in doubt.³⁶⁴ Technical words shall be given their technical meaning and non-technical words their non-technical meaning.³⁶⁵ For instance, the word "poor" in its technical sense means a person actually receiv-

³⁵⁹ *People v St. Lawrence County*, 103 N.Y. 541, 9 N.E. 311.

³⁶⁰ *Smith v People*, 65 Ill. 375; *Newcomer v Jefferson Tp.*, 181 Ind. 1, 103 N.E. 843; *Silbersack v Kraft*, 195 Ky. 587, 240 S.W. 392; *Augusta v Waterville*, 106 Me. 394, 76 Atl. 707; *Atlantic County v Bugbee*, 98 N.J.L. 423, 119 Atl. 785; *People v St. Lawrence County*, 103 N.Y. 541, 9 N.E. 311; *Nissley v Lancaster County*, 27 Pa. Super. 405; *Barnet v Woodbury*, 40 Vt. 266. The social welfare act bearing a provision dealing with transient persons likely to become a public charge and having no legal settlement in the county where found, operated to repeal by implication an earlier statute authorizing the removal of such persons to the place where they belonged. *State v Lange*, 148 Kan. 614, 83 Pac. (2) 653.

³⁶¹ *People v DeWitt County*, 161 Ill. Ap. 529; *Gleason v Sedgwick County*, 92 Kan. 632, 141 Pac. 584; *Hazlip v Edmonson County (Ky.)* 14 S.W. (2) 398. And see *State ex rel McDonald v Stevenson (Wash.)* 29 Pac. (2) 400, where court would not change "shall" for "may".

³⁶² This would seem particularly true with reference to the duty of communities to provide for relief, in the absence of a clear requirement to the contrary. *Startup v Harmon*, 59 Utah 329, 203 Pac. 637. Also note *Holland v Cedar Grove (Wis.)* 282 N.W. 111.

³⁶³ Also see *Wood v Boone County*, 153 Iowa 92, 133 N.W. 377; *Miller v Tucker*, 142 Miss. 146, 105 So. 774.

³⁶⁴ *George v George*, 3 Pa. Dist. & Co. 477.

³⁶⁵ *Risner v State ex rel Martin*, 55 Ohio Ap. 151, 9 N.E. (2) 151.

ing public aid, while "indigent" in its non-technical sense refers to a person destitute and a proper subject for public aid.³⁶⁶

The courts have also declared the meaning of other words or expressions. Among them, the word "poor" in a statute has been held to be used to describe those who are destitute and helpless, unable to support themselves, and without means of support;³⁶⁷ the word "pauper" has been construed not to mean a person who lived seventeen months in a town without receiving relief;³⁶⁸ and the words "poor" and "indigent" have been apparently regarded as synonymous.³⁶⁹ A "non-resident" within the meaning of a poor relief statute has been held to refer to a non-resident of the state;³⁷⁰ a "transient" to mean merely a person away from home;³⁷¹ and a person "belongs" in a town in which he has acquired a legal settlement.³⁷² A statute which provided for the support of dependent adults by relatives, was construed to include female dependents, although only the masculine pronouns, "his" and "himself" were used;³⁷³ and the words "child" and "children" in a statute requiring certain kindred of poor persons to support them, were interpreted to refer only to legitimate children, although the words

³⁶⁶ Ibid. Similarly, work on the W.P.A. constitutes "relief" within the statute which creates welfare settlement by one year's residence in the town without receiving public relief. In re Matruski, 8 N.Y.S. (2) 471.

³⁶⁷ State v Osawkee Township, 14 Kan. 418; Busser v Snyder, 282 Pa. St. 440, 128 Atl. 80, 37 A.L.R. 1515.

³⁶⁸ Ellington v Industrial Comm. (Wis.) 273 N.W. 530. Similarly, an aged man, having no property or rights in property of any value, is 'needy', even though he has a child who can support him. Moore v State Social Security Comm. (Mo. Ap.) 122 S.W. (2) 391. Likewise, a person of the prescribed age and residence, with no pecuniary income, was "in need" within the Old Age Assistance statute, although the applicant's son and daughter were financially able and did provide food, clothing and shelter for him. Conant v State (Wash.) 84 Pac. (2) 378. And while the word "income" in this Old Age Assistance law includes all sources of income, State ex rel Eckroth v Borge (N.D.) 283 N.W. 521, the donation of fifty dollars monthly to the applicant's wife, by her son-in-law, was no "income" or "resources". Price v State Social Security Comm. (Mo. Ap.) 121 S.W. (2) 298.

³⁶⁹ Risner v State ex rel Martin, 55 Ohio Ap. 151, 9 N.E. (2) 151.

³⁷⁰ Richland County v Decker Township, 275 Ill. Ap. 220.

³⁷¹ St. Albans Hospital v St. Albans (Vt.) 176 Atl. 302.

³⁷² Washington v Warren, 123 Conn. 268, 193 Atl. 751.

³⁷³ Frankel v Goldstein, 280 N.Y.S. 191, 155 Misc. 531.

"by consanguinity" were used in the statute.³⁷⁴ The word "assistance" implies that the needy person may be able to bear some of the expense of his support;³⁷⁵ "again" means once more;³⁷⁶ and "healthy" and "able-bodied" mean the possession of that health and physical ability ordinarily possessed by men of sound bodies.³⁷⁷

§ 352. The Police Power, Generally.—Statutes pertaining to the police power are generally to be liberally construed but with the least possible interference with the rights and liberties of the people individually,³⁷⁸ and especially where the statute is penal in its nature.³⁷⁹ And statutes which grant the right to exercise a part of the police power of a state are to be construed strictly and any reasonable doubt resolved against the grant.³⁸⁰ Similarly, where the legislature specifically enumerates the powers which the political subdivision may exercise, there is an implied exclusion of all others.³⁸¹

§ 353. Food and Drug Acts.—Laws regulating the manufacture and sale of foods and drugs should be liberally construed by

³⁷⁴ *Plymouth v Hey* (Mass.) 189 N.E. 100.

³⁷⁵ *Peabody v Holland*, 107 Vt. 237, 178 Atl. 888, 98 A.L.R. 866.

³⁷⁶ *Randolph v Montgomery* (Vt.) 194 Atl. 481.

³⁷⁷ *Starksboro v Hinesburgh*, 15 Vt. 200.

³⁷⁸ *Common. v Beck*, 187 Mass. 15, 72 N.E. 357; *In re Jacobs*, 98 N.Y. 98; *People v Sommer*, 106 N.Y.S. 190, 55 Misc. R. 55; *Nance v Southern Pac. R. Co.*, 149 N.C. 366, 63 S.E. 116. Also see *Gray v Stewart*, 70 Kan. 429, 78 Pac. 852.

³⁷⁹ *State v Biggs*, 133 N.C. 729, 46 S.E. 401, 64 L.R.A. 139. But note *U.S. ex rel Stevens v Richards*, 33 Ap. D.C. 410, where the penal features were regarded as remedial and a strict construction in favor of the defendant avoided.

³⁸⁰ *People v Chicago*, 261 Ill. 16, 103 N.E. 609; *Slaughter v O'Berry*, 126 N.C. 181, 35 S.E. 241, 48 L.R.A. 442.

³⁸¹ *Cumnock v Little Rock*, 154 Ark. 471, 243 S.W. 57, 25 A.L.R. 608.

the courts.³⁸² In fact, they are looked upon by the courts with considerable favor, and with the result that every effort will be exerted to secure for the public the benefits intended by the legislature.³⁸³ Nevertheless, a liberal construction does not warrant the extension of the statute beyond its intended scope,³⁸⁴ nor the exclusion of cases clearly within such scope.³⁸⁵ But the penal features or provisions of food and drug laws, like all penal statutes, must be strictly construed.³⁸⁶

Regardless, however, of the rule to be applied, words used in the statute should receive their ordinary meaning;³⁸⁷ that construction which renders the enactment valid will be preferred over

³⁸² U.S. v Corbett, 215 U.S. 233, 30 S.Ct. 81, 54 L.Ed. 173; State v Closser, 179 Ind. 230, 99 N.E. 1057; State v Schlenker, 112 Iowa 642, 84 N.W. 698, 51 L.R.A. 347; Wilson v Israel, 227 N.Y. 423, 125 N.E. 819. "It is a sound rule that, where the intent of the legislature and the object and purpose of a law are obvious, and such manifest purpose and intent are not inconsistent with or outside the terms of the law, it is not allowable to permit the intent and purpose to be defeated merely because not defined and declared in the most complete and accurate language." In re Arrigo, 98 Neb. 134, 152 N.W. 319. Accordingly, the provisions of the Sanitary Code, being obviously designed to protect the health of the public should be liberally construed to achieve that purpose. S. H. Cranston, Inc., v Dept. of Health, 6 N.Y.S. (2) 275. Similarly, the Milk Control law, not being regarded as a penal statute even though it contained penalties for its violation, but as remedial, should be subject to a liberal construction. Common. v Ortwein (Pa.) 200 Atl. 859.

³⁸³ U.S. v Lewis, 235 U.S. 282, 35 S.Ct. 44; Graff v State, 171 Ind. 547, 85 N.E. 769.

³⁸⁴ Common. v Boston White Cross Milk Co., 209 Mass. 30, 95 N.E. 85; State v Swift, 84 Neb. 244, 120 N.W. 1127; Bell v Moen's Cement Co., 52 N.Y.S. 1084, 32 Ap. Div. 362; Stull v Reber, 215 Pa. 156, 64 Atl. 419; State v Luther, 20 R.I. 472, 40 Atl. 9.

³⁸⁵ Ex parte Reiniger (Calif.) 193 Pac. 81; Stull v Reber, 215 Pa. 156, 64 Atl. 419.

³⁸⁶ State v Neslund, 141 Iowa 461, 120 N.W. 107; People v Braested, 51 N.Y.S. 824, 30 Ap. Div. 401; Ransick v State, 62 Ohio St. 283, 56 N.E. 1024; Common. v Kebort, 212 Pa. 289, 61 Atl. 895; Delk v Liggett & Myers, 180 S.C. 436, 186 S.E. 383. But provisions for the recovery of penalties have been given a reasonable construction. People v Martin, 151 N.Y.S. 69, 88 Misc. 519.

³⁸⁷ State v Wigglesworth, 93 Kan. 610, 144 Pac. 831; State v Swift, 273 Mo. 642, 200 S.W. 1066. Also see People v Consumer's Sanitary, etc., Stores, 247 Ill. Ap. 39, that the court must give words their plain meaning.

one which will render it invalid;³⁸⁸ retroactive operation is not to be favored;³⁸⁹ and repeals by implication will not take place unless the intent to repeal clearly appears.³⁹⁰ And specific provisions will control the general provisions of the statute.³⁹¹

The following illustrations will reveal the attitude of the courts in the construction of statutes regulating food and drugs. For instance, the "milk" referred to in a regulatory statute is not limited to that which is used for human consumption.³⁹² Similarly, "sugar cane" will include beet sugar;³⁹³ "common table salt" will include rock salt;³⁹⁴ and the word "whoever" will include a corporation.³⁹⁵ On the other hand, "glucose" is not a syrup in the common meaning of the term;³⁹⁶ "concentrated milk" is not milk in its ordinary meaning;³⁹⁷ and "butter" does not include oleo-margarine.³⁹⁸ "Well advertised" means well known;³⁹⁹ "expose for sale" means having in stock, even though not physically shown to the buyer;⁴⁰⁰ and food is "unwholesome" when its consumption will render a normal person in normal condition ill.⁴⁰¹ And among the words given their ordinary and usual meaning will be found "consumer",⁴⁰² "sausage",⁴⁰³ and "may".⁴⁰⁴

If any penal statute is entitled to a liberal interpretation, those relating to food and drugs must logically fall within that category. The reason is obvious. In the first place, it may be regarded as doubtful whether the primary purpose of such statutes is to inflict punishment. Instead, they are mainly concerned with

³⁸⁸ *In re Hoffman*, 155 Calif. 114, 99 Pac. 517; *St. Louis v Kruempeler*, 235 Mo. 710, 139 S.W. 446.

³⁸⁹ *People v Wendell*, 217 N.Y. 260, 111 N.E. 846.

³⁹⁰ *St. Louis v Kruempeler*, 235 Mo. 710, 139 S.W. 446.

³⁹¹ *Pierre Vais Maple Co. v Dairy Comrs.*, 154 Mich. 73, 117 N.W. 553.

³⁹² *Milk Control Board v Phend (Ind.)* 9 N.E. (2) 121.

³⁹³ *Curtice v Barnard*, 209 Fed. 589.

³⁹⁴ *Ibid.*

³⁹⁵ *Common. v Graustein*, 209 Mass. 38, 95 N.E. 97.

³⁹⁶ *McDermott v State*, 143 Wis. 18, 126 N.W. 888.

³⁹⁷ *Common. v Boston White Cross Milk Co.*, 209 Mass. 30, 95 N.E. 85.

³⁹⁸ *State v Ransick*, 62 Ohio St. 283, 56 N.E. 1024.

³⁹⁹ *Borden's Farm Products Co. v Baldwin (U.S.)* 55 S.Ct. 187.

⁴⁰⁰ *People v Jacob Branfman & Son*, 263 N.Y.S. 629.

⁴⁰¹ *Mills Restaurant Co. v Clark (Ohio)* 185 N.E. 470.

⁴⁰² *Ex parte Mehlman (Tex.)* 75 S.W. (2) 689.

⁴⁰³ *Armour v State Dairy Comrs.*, 159 Mich. 1, 123 N.W. 846.

⁴⁰⁴ *U.S. v Lexington Milk Co.*, 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658.

protecting society from those who would seek monetary gain even at the impairment, if not destruction of human life. The penal provisions are of secondary importance, so far as the nature of these statutes are concerned. Usually, those who are subject to the provisions of our pure food and drug acts, are not ordinary persons, but persons who know, or who are in a position to know or to obtain knowledge about the ingredients of the food or drug which they manufacture or sell. These statutes are addressed to persons who logically know or should know whether their product is fit for human use and consumption. If the language is definite enough to provide merely a fair warning, very little objection can be raised toward subjecting the statute to a construction favoring the public.

Here is one instance where the welfare of the public should usually be regarded paramount to individual profit or even liberty to manufacture or sell. Persons engaged in manufacturing drugs and food stuff should properly be held to a rigid regard for the safety of the public. The dangers naturally attendant on the unregulated manufacture and sale of food and drugs constitute a threat to society that cannot be overlooked. While individual liberty should be accorded, in most instances, the utmost in the way of public concern, there is, as we have often stated, a point where the former must give way to the public welfare. In the realm of food and drugs, the point must be confined much closer than in many other fields of human activity. Here, the public welfare is the supreme law of the land.

§ 354. Blue Sky Laws.—Laws of this character are intended to protect the public against fraud and imposition on account of its ignorance generally of financial matters.⁴⁰⁵ As a result, such laws should be liberally construed to effect their intended purpose.⁴⁰⁶ And the fact that the penalties provided by blue sky laws are drastic does not seem to justify excepting any case clearly

⁴⁰⁵ *Hornaday v State* (Okla.) 208 Pac. 228; *People v Montague*, 280 Mich. 610, 274 N.W. 347. Also see *Hall v Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480.

⁴⁰⁶ *People v Montague*, 280 Mich. 610, 274 N.W. 347. And see *Kerst v Nelson*, 171 Minn. 191, 213 N.W. 904, 54 A.L.R. 495; *New Amsterdam Cas. Co. v Hude* (Ore.) 34 Pac. (2) 930, reh. den. 35 Pac. (2) 980.

within the spirit and letter of the law.⁴⁰⁷ Nor does a liberal construction warrant an extension of the statute's scope beyond that clearly required by its language.⁴⁰⁸

One of the most valuable cases from the standpoint of a detailed treatment of the construction of Blue Sky legislation is that of *Wigington v Mid-Continent Royalty Company* (130 Kan. 785, 288 Pac. 749). The court there quite properly bases its construction on the predominating purpose of laws of this character—to suppress and to prevent fraud—and quotes the following from Endlich on the Interpretation of Statutes:

“In construing statutes against frauds it has been said, that, where the statute acts against the offender and inflicts a penalty, it is to be strictly construed; but where it acts upon the offense by setting aside the fraudulent transaction, it is to be construed liberally.”

It also quotes approvingly from *State v Gopher Tire and Rubber Co.* (146 Minn. 52, 177 N.W. 937):

“The purpose of the statute is to protect the public against imposition. It is a new form of regulatory law, which in the course of a few years, has swept over thirty-three states. It has been said that its popular name indicates the evil at which it is aimed; that is, speculative schemes having no more basis than so many feet of blue sky, and that it is intended to put a stop to the sale of shares in visionary oil wells, nonexistent gold mines, and other ‘get-rich-quick’ schemes calculated to despoil credulous individuals of their savings. It is a proper and needful exercise of the police power of the state and should not be given a narrow construction; for it was the evident pur-

⁴⁰⁷ *Guaranty Mortgage Co. v Wilcox*, 62 Utah 184, 218 Pac. 133, 30 A.L.R. 1325. But if penal provisions are involved, should not the rule of strict construction applicable to statutes generally be applied? That blue sky laws are penal in character, see *Kneeland v Emerton*, 280 Mass. 371, 183 N.E. 155, 87 A.L.R. 1. There seems to be some confusion in the authorities. That Blue Sky Laws are penal, and therefore to be strictly construed, see *Miller v Stuart*, 69 Utah 250, 253 Pac. 900; *Marney v Home Royalty Assn.*, 34 N.M. 632, 286 Pac. 975; that they are remedial in nature, being enacted to protect the investing public, and consequently must be liberally construed to carry out their purpose, see *New Amsterdam Cas. Co. v Hyde*, 148 Ore. 229, 34 Pac. (2) 930. And see *Wigington v Mid-Continent Royalty Co.*, 130 Kan. 785, 288 Pac. 749, that such legislation should be liberally construed when operating against the offense sought to be prohibited.

⁴⁰⁸ *Gutterson v Pearson*, 153 Minn. 482, 189 N.W. 458, 24 A.L.R. 519; *State v Heath*, 199 N.C. 135, 153 S.E. 855, 87 A.L.R. 31. Also see Note, 24 A.L.R. 528, and Note, 27 A.L.R. 1170.

pose of the legislature to bring within the statute the sale of all securities not specifically exempted."

And in reaching a decision, the Kansas court states:

"The action before us at the present time is civil and not criminal in its nature. It is one in which the operation of the statute applies to the offense and not to the offender. Since it is unnecessary to a decision of this case, we shall not at this time determine whether the statute shall be strictly or liberally construed in cases of criminal prosecution for violation of the law, but will determine the construction to be given the statute in all cases where it operates on the offense.

"Realizing the difficulty courts have in attempting to establish an exact definition of fraud, and the fact that the legislatures in enacting laws for the purpose of preventing fraud are confronted with this same difficulty, the rule of liberal construction of statutes designed to prevent fraud is unquestionably a proper one where the statute acts upon the offense. The general rule contended for by appellants is subject to an exception where the statute is one designed to prevent fraud when the application of the statute acts upon the offense and not the offender. It is our conclusion that in civil actions such as the case at bar, where the statute acts upon the offense committed, the blue sky law is entitled to a liberal construction in order to accomplish the purpose which the legislature had in mind when it enacted the law."

From the foregoing, perhaps, one may be able to reconcile the apparent conflict in the authorities. At least, the proper rule is stated where the proceeding is not a criminal proceeding. And where it is a criminal prosecution, the logical rule would be to subject the legislation to a strict construction in conformity with penal acts generally.

Through the application of the aforesaid principles of construction, the following have been held to be "securities" within the meaning of blue sky statutes; shares of the heirs' interest in town patentees' estate;⁴⁰⁹ mineral deeds giving the purchaser the right to a proportionate share in the oil produced;⁴¹⁰ certificates granting the right of burial in cemeteries, with a provision for a resale option;⁴¹¹ membership receipts issued for shares in a syndicate which provided that the owner was entitled to a pro rata interest in the profits;⁴¹² and certificates of participation in a net income

⁴⁰⁹ *People v Sowall*, 279 Mich. 261, 171 N.W. 751.

⁴¹⁰ *State v Pullen (R.I.)* 192 Atl. 473.

⁴¹¹ *In re Waldstein*, 291 N.Y.S. 697, 160 Misc. 763.

⁴¹² *Groby v State (Ohio)* 143 N.E. 126.

trust of mineral rights in certain land.⁴¹³ Similarly, a "broker" has been held to include a person dealing in securities held by others,⁴¹⁴ and a person engaged in buying and selling building and loan certificates.⁴¹⁵ The word "vendor" has been construed to include a person effecting the sale and the party who negotiated or attempted to negotiate the transfer of securities for property.⁴¹⁶ Securities are "offered for sale to the public", even though the effort to sell is limited to that portion of the public particularly susceptible to such offers.⁴¹⁷ And the printing and wide circulation of a prospectus inviting the public to subscribe for certain stock, the writing and sending of numerous letters, and the personal display and distribution of literature for the same purpose has been held to be "advertising".⁴¹⁸ But perhaps more commensurate with the less liberal construction to which the penal provisions are subjected, the word "hearing" has been held to presuppose a formal proceeding upon notice, with adversary parties, and with issues, on which evidence may be adduced by both parties, and in which all have a right to be heard.⁴¹⁹

§ 355. Anti-trust Legislation.—The purpose of anti-trust legislation is to prevent any sort of a combination in restraint of trade or which creates a monopoly under which the supply and price of commodities may be controlled.⁴²⁰ Such statutes are penal in their nature and therefore entitled to a strict construction.⁴²¹ They are

⁴¹³ *Ward v Home Royalty Ass'n*, 142 Kan. 546, 50 Pac. (2) 992 (speculative securities).

⁴¹⁴ *White v Financial Guarantee Corp.* (Calif.) 56 Pac. (2) 550.

⁴¹⁵ *People v Woolsey* (Calif.) 56 Pac. (2) 557.

⁴¹⁶ *Assoc. Gas & Electric Co. v P. S. Comm.* (Wis.) 266 N.W. 205.

⁴¹⁷ *Mary Pickford Co. v Bayly Bros.* (Calif.) 68 Pac. (2) 329.

⁴¹⁸ *People v Montague*, 280 Mich. 610, 274 N.W. 347.

⁴¹⁹ *Bracken v Securities & Exch. Comm.* (U.S.) 57 S.Ct. 18.

⁴²⁰ *Ford v Chicago Milk Shipping Assoc.*, 155 Ill. 166, 39 N.E. 651, 27 L.R.A. 298; *Aetna Life Ins. Co. v Robertson*, 126 Miss. 387, 88 So. 883; *Kellogg v Sowerby*, 190 N.Y. 370, 83 N.E. 47. For similar purpose of Federal Anti-Trust Act, see *U.S. v American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; *Prairie Farmer's Pub. Co. v Indiana Farmer's Guide Pub. Co.* (U.S.) 57 S.Ct. 135.

⁴²¹ *Witherell, etc., Co. v United Shoe Mch. Co.*, 267 Fed. 950; *State v Frank*, 114 Ark. 47, 169 S.W. 333; *Butterick Pub. Co. v Fisher*, 203 Mass. 122, 89 N.E. 189; *State v Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595, 45 L.R.A. 363.

also regarded as declaratory of the common law so far as they go.⁴²² But a further reason for subjecting them to a strict construction may be found in the purpose of anti-trust legislation—to protect the public rather than to place limitations upon business enterprise.⁴²³ Nevertheless, if the former—the protection of the public—is regarded of greatest importance, it would seem proper to construe the legislation liberally in favor of the public. Perhaps this accounts for the inclusion in some acts of an express provision requiring that the legislation be liberally construed toward the suppression of trusts and combines.⁴²⁴ At one time, the Federal Anti-Trust Law seems to have been subjected to such a liberal construction,⁴²⁵ although today the “rule of reason” is applied, by virtue of which no combination or contract is prohibited which is in reasonable restraint of interstate commerce.⁴²⁶ And what is reasonable, in turn, seems to depend upon the combination’s effect upon the interest of the public.⁴²⁷

In the interpretation of anti-trust legislation, even though it be subject to strict construction, the construction should not be so strained as to defeat the obvious intent of the lawmakers.⁴²⁸ Nor, on the other hand, should the construction render the statute’s

⁴²² U.S. Telephone Co. v Central Union Tel. Co., 202 Fed. 66; In re Davies, 168 N.Y. 89, 61 N.E. 118, 56 L.R.A. 855; State v Virginia-Carolina Chemical Co., 71 S.C. 544, 51 S.E. 455. And see State v Standard Oil Co., 218 Mo. 1, 116 S.W. 902, where an anti-monopoly statute was regarded as supplementary of the common law and remedial and entitled to a liberal construction.

⁴²³ Cumberland Tel., etc., Co. v State, 100 Miss. 102, 54 So. 670; State v Virginia-Carolina Chemical Co., 71 S.C. 544, 51 S.E. 455.

⁴²⁴ Yazoo, etc., R. Co. v Searles, 85 Miss. 520, 37 So. 939, 68 L.R.A. 715; Kosciusko Oil Mill Co. v Wilson, 90 Miss. 551, 43 So. 435. Also see Pond Creek Coal Co. v Lester, 171 Ky. 811, 188 S.W. 907.

⁴²⁵ See U.S. v Joint Traffic Assoc., 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259; U.S. v Swift, 122 Fed. 529.

⁴²⁶ U.S. v American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663; Standard Oil Co. v U.S., 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619.

⁴²⁷ Wm. Filene’s Sons Co. v Fashion Originators’ Guild, 90 Fed. (2) 556. Also see Prairie Farmer Pub. Co. v Indiana Farmer’s Guide Pub. Co., 299 U.S. 156, 57 S.Ct. 135.

⁴²⁸ State v General Fire Extinguisher Co., 9 Ohio N.P.N.S. 438.

scope more inclusive than the language fairly justifies.⁴²⁹ Consequently, in seeking to discover the legislative intent, the court should give the language of the statute its plain and natural meaning;⁴³⁰ the court is entitled to construe the statute in the light of other statutes in *pari materia*;⁴³¹ and recourse to the circumstances which led to the enactment of the statute will be beyond a doubt proper,⁴³² as will be resort to the history of the statute's enactment.⁴³³

The word "commodity" has been held to include shares of stock,⁴³⁴ and to be of a broader import than the word "merchandise".⁴³⁵ In the Clayton Act, the word "commerce" has been construed to mean interstate commerce, due regard being given to the context of the act.⁴³⁶ But the laundry business has been held without the purview of a statute making it unlawful for one engaged in "commerce" to fix prices or to make sales on the condition that the buyer shall use no other concern's products.⁴³⁷ Applying a more liberal view, the word "trade" was interpreted to include motion pictures.⁴³⁸ Nor is a corporation included in the word "person" where the other provisions indicate that the legislative intent was not to include them.⁴³⁹ The Federal Anti-Trust act,

⁴²⁹ *State v Lancashire F. Ins. Co.*, 66 Ark. 466, 51 S.W. 633, 45 L.R.A. 348. The act should not be construed so as to destroy or cripple business, unless there is no escape from such a construction. *Yazoo, etc., R. Co. v Crawford*, 107 Miss. 355, 65 So. 462. General language will confine the law to those which it is reasonable to presume were meant by the legislature. *State v Smiley*, 65 Kan. 240, 69 Pac. 199, 67 A.L.R. 903. Those businesses over which the legislature has no authority will be excluded from the act's operation. *Chicago Wall Paper Mills v General Paper Co.*, 147 Fed. 491.

⁴³⁰ *Pond Creek Coal Co. v Lester*, 171 Ky. 811, 188 S.W. 907.

⁴³¹ *State v American Surety Co.*, 91 Neb. 22, 135 N.W. 365.

⁴³² *Yazoo, etc., R. Co. v Searles*, 85 Miss. 520, 37 So. 939, 68 L.R.A. 715.

⁴³³ *Atlantic Cleaners & Dyers, Inc., v U.S.*, 286 U.S. 427, 76 L.Ed. 1204, 52 S.Ct. 607.

⁴³⁴ *Pound v Lawrence (Tex.)* 233 S.W. 359.

⁴³⁵ *Ibid.*

⁴³⁶ *Lipson v Socony-Vacuum Corp.*, 76 Fed. (2) 213.

⁴³⁷ *State v McClellan*, 155 La. 37, 98 So. 748.

⁴³⁸ *Campbell v Motion Pict. Mach. Oper. Union*, 151 Minn. 220, 186 N.W. 781, 27 A.L.R. 631.

⁴³⁹ *Standard Oil Co. v State*, 117 Tenn. 618, 100 S.W. 705.

however, expressly provides that the word "person or persons" shall be deemed to include corporations and associations.⁴⁴⁰

Of course, it is impossible to discuss with any degree of thoroughness the many problems relating to the construction of anti-trust legislation. In this field of legislation, our philosophies with reference to trusts is not very specific and, in fact, seem to be in a state of flux. In some ways, huge monopolies are looked upon with considerable favor, even by the governments, and again in other respects they are viewed with stern disfavor. Considerable inconsistencies exist.

Perhaps the only safe way to interpret anti-trust legislation, is to first favor the individual and his rights over that of the huge combine. While large combines are frequently beneficial to the public at large, and often may be necessary, even combines of this sort should be rigidly regulated lest individual rights be completely stamped out. Immense power is inevitably vested in trusts—power which may be used destructively, and against which the individual can do nothing or little to protect himself. Until we decide to choose the philosophy favoring the monopoly over the individual on the ground that it is the best for the welfare of the public at large, unless the monopoly is a natural one, interpretation of all legislation should be favorable to individual rights. In fact, even where the monopoly is a natural one, in most instances, the individual should be favored. Perhaps only where the public welfare is paramount to individual rights, should this sort of interpretation be discarded by the courts.

§ 356. Grants of Monopoly.—It is not an infrequent event, for the legislature to grant a monopoly to a corporation or private person. Such a grant, however, is to be strictly construed against the grantee and liberally in favor of the state.⁴⁴¹ In fact, there is a presumption against the intention of the legislature to grant a monopoly or exclusive franchise, and all doubt will be resolved in favor of the state.⁴⁴² In other words, before an exclusive fran-

⁴⁴⁰ *Northern Securities Co. v U.S.*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679; *Standard Oil Co. v U.S.*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619.

⁴⁴¹ *Knoxville Water Co. v Knoxville*, 200 U.S. 22, 26 S.Ct. 224, 50 L.Ed. 353; *North Springs Water Co. v Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L.R.A. 214. Also see § 230, *supra*.

⁴⁴² *Charles River Bridge Co. v Warren Bridge (U.S.)* 11 Pet. 420, 9 L.Ed. 773; *Shreveport Traction Co. v Shreveport*, 122 La. 1, 47 So. 40.

chise will be considered granted, the intent of the legislature to make such a grant must be clear, certain and unequivocal.⁴⁴³

Similarly, where the rights of an individual and those of the holder of a public monopoly conflict, the true status of an individual justifies a strict construction of an ambiguous statute in favor of the individual, at least where the monopoly or franchise is not one granted to an individual or a corporation simply for the performance of a public duty or function. If the legislative grant invests the holder of the grant or franchise with a monopoly over a matter, not connected, at least, directly with the performance of a governmental function, essential to the life or well-being of the individual, the requirement of a strict construction against the holder of the monopoly seems beyond question proper. This view would consequently apply to all public utilities.

§ 357. **Licenses.**—Statutes which impose licenses are to be construed liberally in favor of the individual and strictly against the state.⁴⁴⁴ In other words, their scope should not be extended by

⁴⁴³ *Ruggles v Illinois*, 108 U.S. 526, 2 S.Ct. 832, 27 L.Ed. 812.

⁴⁴⁴ *State v Dr. Pepper Bottling Co.*, 228 Ala. 607, 155 So. 93; *Armstrong v Denver Saunders System*, 84 Colo. 138, 268 Pac. 976; *Texas v Amos*, 77 Fla. 327, 81 So. 471; *Green v Weller*, 176 Ky. 129, 195 S.W. 422; *State v Hatfield*, 73 Mo. Ap. 506; *People v Ericson*, 147 N.Y.S. 226; *Watts v Common.*, 106 Va. 85, 56 S.E. 223. Sometimes, the rule is stated that statutes restraining the exercise of a trade, occupation or business must not be deemed to restrain private rights, in the absence of a clear legislative intent to the contrary. *State v Gillan*, 126 Kan. 368, 268 Pac. 94. They should be construed liberally in favor of the citizen. *Pee Dee Chair Co. v Camden*, 165 S.C. 86, 162 S.E. 771. But note *Wingfield v South Carolina Tax Comm.*, 134 S.C. 251, 131 S.E. 421, where the court in construing a statute which prescribed a license tax from dealers in cosmetics, held the rule of strict construction of tax laws should be subordinated to the rule of reasonable construction. And see *Attorney General v Union Plumbing Co. (Mass.)* 16 N.E. (2) 89, that the word "person" in a statute prohibiting any person from engaging in the business of a master plumber without a license, included a corporation. There seems to be one exception to the rule of liberal construction; it is not applicable to a statute imposing a license fee on a foreign corporation as a condition precedent of doing business in the state. *Watts v Common.*, 106 Va. 85, 56 S.E. 223. But there is no valid reason for such a view. The terminology of a statute is not controlling in determining whether it provides a tax or a license. *Solberg v Davenport*, 211 Iowa 612, 232 N.W. 477. For treatment of taxes as to strict or liberal construction, see §§ 257-259, *supra*.

implication, unless clearly required by the language of the act.⁴⁴⁵ This rule is particularly applicable where a penal provision is involved.⁴⁴⁶ Nevertheless, even though the individual is favored over the state and careful consideration shown by the court for individual rights, the court cannot ignore or avoid the plain intent of the legislature.⁴⁴⁷

Of course, in order to ascertain the meaning of the statute, when it is in doubt, the statute should be construed in its entirety,⁴⁴⁸ and in the light of its context, object and subject matter.⁴⁴⁹ Moreover, every reasonable presumption will be raised in favor of the statute's validity.⁴⁵⁰ Even the repeal of such a statute, or any of its provisions, by implication is not favored, although such a repeal will take place where the legislature enacts a subsequent enact-

⁴⁴⁵ *Hughson Condensed Milk Co. v Board of Equalization (Calif.)* 73 Pac. (2) 290; *Somers v Commercial Finance Corp.*, 245 Mass. 286, 139 N.E. 837; *State v Lutley*, 55 Mont. 545. Illustrative of the text, an occupation tax will be presumed to be the only tax on such occupation. *Dallas Cons. Elec. Co. v State*, 102 Tex. 570, 120 S.W. 997.

⁴⁴⁶ *Texas Co. v Amos*, 77 Fla. 327, 81 So. 471; *State v Russell*, 181 Wis. 76, 194 N.W. 43. And note especially, *Wigington v Mid-Continent Royalty Co.*, 130 Kan. 785, 288 Pac. 749.

⁴⁴⁷ *Porter v State*, 58 Ala. 66. The legislative intent must be determined from the language. *State ex rel Athletic Club v Boxing Comm.*, 163 La. 418, 112 So. 31.

⁴⁴⁸ *Muskogee v Wilkins (Okla.)* 175 Pac. 497; *Central Vermont Ry. v Campbell*, 108 Vt. 510, 192 Atl. 197, 111 A.L.R. 175.

⁴⁴⁹ *White v Moore (Ariz.)* 46 Pac. (2) 1077; *Central Vermont Ry. v Campbell*, 108 Vt. 510, 192 Atl. 197, 111 A.L.R. 175. Thus, whether a statute providing that the labor commissioner "may" issue licenses for employment agents, is mandatory, depends upon its object and the evils sought to be remedied. *Lyons v Gram*, 122 Ore. 684, 260 Pac. 220. Also see *In re Rudhlan*, 272 N.Y.S. 269, 146 Misc. 308. "We think, therefore, that, having in mind the purpose of the Corporate Securities Act, we are not compelled to construe the statute in compliance with the common-law rule of strict construction, but that we should rather indulge in a construction of the act in accordance with the fair import of its terms." *People v Jackson (Calif.)* 74 Pac. (2) 1085, 1094.

⁴⁵⁰ *Hooper v California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297; *Dexter v Western Union Tel. Co.*, 150 Ga. 294, 103 S.E. 430. Also see *Ex parte Byles*, 93 Ark. 612, 126 S.W. 94. For partial invalidity, see *Barrett v New York*, 232 U.S. 14, 34 S.Ct. 203, 58 L.Ed. 483; *Common. v Hanna*, 195 Mass. 262, 81 N.E. 149; *Magneau v Fremont*, 30 Neb. 843, 47 N.W. 280.

ment intended to supplant the prior law,⁴⁵¹ or where the latter enactment is repugnant and irreconcilably inconsistent with the previous legislation.⁴⁵² And a repeal, without a saving clause, will destroy all rights and remedies under the repealed statute,⁴⁵³ and will operate to take away all the rights given by a license granted under the old law.⁴⁵⁴

Statutes which grant the power to license are, however, to be strictly construed against the grantee.⁴⁵⁵ Accordingly, the power should not be extended by implication unless the language of the grant clearly requires such an extension.⁴⁵⁶ All doubt will be resolved in favor of the general public or the state.⁴⁵⁷ Nevertheless, the construction should not be so rigid as to defeat the clear intent of the legislature.⁴⁵⁸

§ 358. **Exemptions.**—Exemption statutes are clearly in derogation of common right and should therefore be strictly construed against the person, whether natural or artificial,⁴⁵⁹ who claims to be exempt from the license.⁴⁶⁰ Obviously, before such an exemption can be allowed, the right to it must be clearly given by the statute.⁴⁶¹ In case there is any doubt, it must be resolved against

⁴⁵¹ *Atlantic City v Larcomb*, 81 N.J.L. 354, 79 Atl. 1068.

⁴⁵² *State v Matthews*, 209 Ala. 193, 95 So. 890. Also see *Orlando v Gill* (Fla.) 174 So. 224, for repeal of exemptions by a later general license law.

⁴⁵³ *Rial v Yakima*, 126 Wash. 694, 219 Pac. 1. Thus, a citizen will be also relieved from the liabilities attached to an unpaid license. *Wheeler v Plumas County*, 149 Calif. 782, 87 Pac. 802.

⁴⁵⁴ *State v Nashville Sav. Bank* (Tenn.) 16 Lea. 111.

⁴⁵⁵ *Terre Haute v Kersey*, 159 Ind. 300, 64 N.E. 469; *Bear v Cedar Rapids*, 147 Iowa 341, 126 N.W. 304; *Norfolk v Griffin*, 120 Va. 524, 91 S.E. 640.

⁴⁵⁶ *Chicago v O'Brien*, 268 Ill. 228, 109 N.E. 10; *Akron v McElligott*, 166 Iowa 297, 147 N.W. 773; *Greene v Fitchburg*, 219 Mass. 121, 106 N.E. 573; *French v Toledo*, 81 Ohio St. 160, 90 N.E. 160.

⁴⁵⁷ *Chicago v Collins*, 175 Ill. 445, 51 N.E. 907; also see *Barnard v Chicago*, 316 Ill. 519, 147 N.E. 384, 38 A.L.R. 1533.

⁴⁵⁸ See *Simrall v Covington*, 90 Ky. 444, 14 S.W. 369.

⁴⁵⁹ *Fisher's Blend Station v Tax Comm.* (Wash.) 45 Pac. (2) 942.

⁴⁶⁰ *Union Pass. R. Co. v Phila.*, 101 U.S. 528, 25 L.Ed. 912; *Harper v England*, 124 Fla. 296, 168 So. 1403; *Common. v Hazel*, 155 Ky. 30, 159 S.W. 673; *State v Soards Directory Co.*, 148 La. 1013, 88 So. 251; *Springfield v Smith*, 138 Mo. 645, 40 S.W. 757, 37 L.R.A. 446; *People v Morgan*, 69 N.Y.S. 263, 59 Ap. Div. 302; *Common. v Cover*, 215 Pa. 556, 64 Atl. 686.

⁴⁶¹ *St. Louis v Boatmen's Ins. Co.*, 47 Mo. 150; *Camas Stage Co. v Kozer*, 104 Ore. 600, 209 Pac. 95, 25 A.L.R. 27. Also see *New Orleans v Robira*, 42 La. Ann. 1098, 8 So. 402, 11 L.R.A. 141.

the existence of the alleged exemption.⁴⁶² Nevertheless, the right of a person to an exemption should not be defeated through construction when such person is within the exempted class.⁴⁶³ Nor is it absolutely necessary, in order for a person to be exempt from the statute, that he be expressly named.⁴⁶⁴

§ 359. **Sales Tax.**—Naturally, those laws which impose a tax on sales, being tax laws, are subject to a strict construction⁴⁶⁵ in accord with tax statutes generally.⁴⁶⁶ In other words, a sales tax statute must be strictly construed in considering its coverage, and no strained construction may be indulged in against the taxpayer simply because of the apparent purpose to raise needed revenue.⁴⁶⁷ Similarly, that a certain construction would yield the state two taxes instead of one, and hence provide more revenue, cannot avail as a criterion of construction.⁴⁶⁸ Like all statutes, a gross sales tax is to be construed as a whole in ascertaining the legislative intent and in the light of existing facts and conditions.⁴⁶⁹ Nor will such statutes be given a retroactive operation, unless such an effect is clearly intended by the lawmakers.⁴⁷⁰

⁴⁶² *Portland v Kozer*, 108 Ore. 375, 217 Pac. 833.

⁴⁶³ *St. Louis v Bender*, 248 Mo. 113, 154 S.W. 88.

⁴⁶⁴ *Knoxville, etc., R. Co. v Harris*, 99 Tenn. 684, 43 S.W. 115, 53 L.R.A. 921; *Hardin v Radford*, 112 Va. 547, 72 S.E. 101. But note *Miller v Kirkpatrick*, 29 Pa. 226, that the enumeration of certain exempt occupations, excludes any not mentioned. Also see *Oil City v Oil City Trust Co.*, 151 Pa. St. 454, 25 Atl. 124, and *Phoebus v Manhattan Social Club*, 105 Va. 144, 52 S.E. 839, that exemption from one form of license does not preclude the levy of another type of license. But the *ejusdem generis* doctrine cannot be invoked to authorize a license tax, see *Keane v Strodtman*, 323 Mo. 161, 18 S.W. (2) 896.

⁴⁶⁵ *Doley v Tax Commission*, 234 Ala. 150, 174 So. 233; *Jordan Undertaking Co. v State (Ala.)* 180 So. 99.

⁴⁶⁶ See *supra*, §§ 257-259.

⁴⁶⁷ *Doley v Tax Commission*, 234 Ala. 150, 174 So. 233.

⁴⁶⁸ *Atlas Supply Co. v Maxwell*, 212 N.C. 624, 194 S.E. 117.

⁴⁶⁹ *Lone Star Cement Corp. v Tax Commission*, 234 Ala. 465, 175 So. 399.

⁴⁷⁰ And so an amendment exempting commercial fertilizer from the tax was refused retroactive effect. *Kennedy v State Board of Assess. (Iowa)* 276 N.W. 205.

Most, if not all sales tax statutes will expressly define the meaning of certain words or expressions. Of course, where the legislature fails to define the word involved, it will bear its popular meaning,⁴⁷¹ but where the word is defined, the court, in construing the statute, will not be concerned with the word's ordinary or usual meaning.⁴⁷² In other words, the court will generally be bound by the legislative definition.⁴⁷³

Even though most sales tax statutes are relatively new, a number of interesting cases have already arisen involving their construction and application. A few examples will indicate the attitude of the courts. For instance, a club transaction in which food is served to a member has been regarded as a sale within the term "transfer of possession".⁴⁷⁴ But confidential non-transferable information sheets furnished subscribers by a corporation supplying confidential information, are not "tangible personal property", a transfer of which constitutes a sale.⁴⁷⁵ Nor does the fact that articles of material or food are consumed in the process of rendering service in the production of other food by a restaurateur's employees, who are given their food as an element of compensation for their services, render such consumption a sale under the Sales Act.⁴⁷⁶

§ 360. Habeas Corpus.—Habeas corpus statutes are entitled to a liberal construction,⁴⁷⁷ in favor of the person imprisoned.⁴⁷⁸ Perhaps the reason for this type of construction is found in the purpose of the writ of habeas corpus, since there is some difference as to the

⁴⁷¹ *Albuquerque Lumber Co. v Bureau of Revenue*, 42 N.M. 58, 75 Pac. (2) 334, involving the word "sale".

⁴⁷² *Hurt v Cooper (Tex.)* 111 S.W. (2) 896, 113 S.W. (2) 929 ("store"). The legislative intent is the determining factor. *State ex rel. Kansas City Power & Light Co. v Smith (Mo.)* 111 S.W. (2) 531.

⁴⁷³ *W. J. Sandberg Co. v Iowa State Board (Iowa)* 278 N.W. 643. Also, the act's definition of a term makes unnecessary any consideration of its meaning at common law. *Blauners v Philadelphia (Pa.)* 198 Atl. 889.

⁴⁷⁴ *Blauners v Philadelphia (Pa.)* 198 Atl. 889.

⁴⁷⁵ *Dun & Bradstreet v New York*, 5 N.Y.S. (2) 597, 168 Misc. 215.

⁴⁷⁶ *State Tax Comm. v Burns (Ala.)* 182 So. 1.

⁴⁷⁷ *People v Lescomb*, 60 N.Y. 559.

⁴⁷⁸ *People v Moss*, 187 N.Y. 410, 80 N.E. 383.

real nature of the proceeding.⁴⁷⁹ But be that as it may,⁴⁸⁰ such statutes should be construed in the light of their purpose, which is to promote the writ's efficiency.⁴⁸¹ They should also be construed with reference to the common law.⁴⁸² And the remedy provided by such statutes is not necessarily exclusive of the common law.⁴⁸³

§ 361. Habitual Criminal Acts.—Statutes which provide for a severer punishment on conviction of a second or subsequent offense, being highly penal, must be strictly construed.⁴⁸⁴ They should not be extended by implication,⁴⁸⁵ and the legislative intent must be ascertained from the words used by the lawmakers.⁴⁸⁶ But where the common law rule of strict construction has been abrogated by a statute which requires all penal acts to be construed according to the fair import of their terms, with a view to effect their objects and promote justice, the habitual criminal act must also be construed in the light of that statute.⁴⁸⁷ And habitual criminal acts are not *ex post facto* in that they increase the punishment on account of previous convictions.⁴⁸⁸

⁴⁷⁹ That habeas corpus is a civil rather than a criminal proceeding, see *Edmonson v Ramsey*, 122 Miss. 450, 84 So. 455, 10 A.L.R. 380. Also see *Ex parte Tom Tong*, 108 U.S. 556, 2 S.Ct. 871, 27 L.Ed. 826; *Martin v Dist. Court*, 37 Colo. 110, 86 Pac. 82; *Henderson v James*, 52 Ohio St. 242, 39 N.E. 805, 27 L.R.A. 290; *State v Huegen*, 110 Wis. 189, 85 N.W. 1046, 62 L.R.A. 700. That it is often criminal in nature, see note in 7 Am. Cas. 1021.

⁴⁸⁰ It is indicated in *Simmons v Georgia Iron etc. Co.*, 117 Ga. 305, 43 S.E. 780, 61 L.R.A. 739, that there is really no necessity to make any distinction.

⁴⁸¹ *Addis v Applegate*, 171 Iowa 150, 154 N.W. 168; *People v Moss*, 187 N.Y. 410, 80 N.E. 333; *Ex parte Weber*, 275 Mo. 677, 205 S.W. 620; *In re Thompson*, 85 N.J. Eq. 221, 96 Atl. 102. Or a swift and summary justice. *Buchanan v Buchanan (Va.)* 197 S.E. 426, 116 A.L.R. 688.

⁴⁸² *Ex parte Brugneaux (Wyo.)* 63 Pac. (2) 800.

⁴⁸³ *Servonitz v State*, 133 Wis. 231, 118 N.W. 277. Also see *Kirby v State*, 62 Ala. 51; *Porter v Porter*, 60 Fla. 407, 53 So. 546.

⁴⁸⁴ *U.S. v Lindquist*, 285 Fed. 447; *Cavassa v Off*, 206 Calif. 307, 274 Pac. 523; *Smalley v People*, 96 Colo. 361, 43 Pac. (2) 385; *State v McCarty*, 210 Iowa 173, 230 N.W. 735; *Metzger v State (Ind.)* 13 N.E. (2) 519; *Ex parte Bailey (Okla.)* 64 Pac. (2) 278; *Common. v Woodward*, 110 Pa. Super. 478, 168 Atl. 343; *State ex rel. McMullen v Simpson*, 152 Wash. 389, 277 Pac. 998.

⁴⁸⁵ *Ex parte Seymour*, 14 Pick. (Mass.) 40, *State v Christup*, 337 Mo. 776, 85 S.W. (2) 1024; *Wright v Common.* 109 Va. 847, 65 S.W. 19. Also see cases under note 484, *ibid.*

⁴⁸⁶ *Common. v Sutton*, 125 Pa. Super. 407, 189 Atl. 556.

⁴⁸⁷ *State v Malusky*, 59 N.D. 501, 230 N.W. 735, 71 A.L.R. 190.

⁴⁸⁸ *Jones v State*, 9 Okla. Cr. 646, 133 Pac. 249; *Common. v Graves*, 155 Mass. 163, 29 N.E. 579, 16 L.R.A. 256.

Obviously, since these statutes are penal, the same problems arise that arise in the construction of criminal statutes generally. Among the problems, none are more difficult than those which pertain to the meaning of the words used in the statute. Sometimes, the cases are extremely close. But be that as it may, the word "punishable" has been held to mean liable to punishment,⁴⁸⁹ and "conviction" to have a popular as well as a technical meaning. As popularly used it means only a finding of guilty by a jury; technically, it means the ascertainment of guilt and the judgment thereon; thereby necessitating not only a verdict but also a judgment or sentence.⁴⁹⁰ And where the act provided for increased punishment on conviction of any person convicted of any offense "punishable by imprisonment in the penitentiary", the act's application was held not limited to persons who had actually been imprisoned in the penitentiary but to include a person sentenced to the workhouse, since the defendant could have been sentenced to the penitentiary for the offense committed.⁴⁹¹

§ 362. Pardon and Parole.—Behind pardon and parole statutes lies the purpose to mitigate the penalties of the law,⁴⁹² or to achieve the reform of the prisoner.⁴⁹³ It is difficult to state whether they should be subject to a strict or liberal construction. Nevertheless, a law regulating the pardoning power has been construed as mandatory.⁴⁹⁴ And a statute which alters or changes the conditions of parole passed after the crime was committed has been held valid.⁴⁹⁵ Moreover, a statute which attempted to restore competency to the testimony of convicts, as to those theretofore convicted, was held ineffective.⁴⁹⁶ These cases would seem therefore to indicate a leaning toward a strict construction.

And in the construction of pardon and parole statutes, other laws in *pari materia* may be considered,⁴⁹⁷ and a probation and a

⁴⁸⁹ *State v Paisley* 36 Mont. 237, 92 Pac. 566.

⁴⁹⁰ *Judge v Powers*, 156 Iowa 251, 136 N.W. 315; *Common. v Minnick*, 250 Pa. St. 363, 95 Atl. 565; *Smith v Common.*, 134 Va. 489, 113 S.E. 707, 24 A.L.R. 1286.

⁴⁹¹ *State v Marshall (Mo.)* 34 S.W. (2) 29.

⁴⁹² *U.S. ex rel. Demarais v Farrell*, 87 Fed. (2) 957.

⁴⁹³ *In re Mounce*, 307 Mo. 40, 269 S.W. 335.

⁴⁹⁴ *Horton v Gillespie*, 170 Ark. 107, 279 S.W. 1020.

⁴⁹⁵ *People ex rel. Parker v Brophy*, 280 N.Y.S. 114, 244 Ap. Div. 880.

⁴⁹⁶ *Underwood v State*, 111 Tex. Cr. 124, 12 S.W. (2) 206, 63 A.L.R. 978.

⁴⁹⁷ *Common. v Burr*, 5 Pa. Dist. & Co. 172.

parole law being identical and having analogous provisions, should be given the same construction.⁴⁹⁸ But the word "persons" in a parole statute does not include a corporation.⁴⁹⁹

§ 363. Usury.—Naturally, in the absence of any statutory provision pertaining thereto, there is no restriction upon the rate of interest which may be charged for the use of money.⁵⁰⁰ By virtue of this fact, usury statutes may properly be considered as in derogation of the common law,⁵⁰¹ and even as a limitation upon the freedom of contract.⁵⁰² Such statutes, however, are justified upon the grounds of public policy,⁵⁰³ and have as their obvious purpose the prevention of excessive rates of interest.⁵⁰⁴ As was said in an early case,⁵⁰⁵ usury laws place the borrower into the same classification of all persons under a legal disability to contract, and such a view seems well taken when the fact is remembered that usually a usurious loan results from the dire necessity of the borrower.⁵⁰⁶

There is some confusion in the cases with reference to the true nature of usury statutes. Some seem to regard them as penal,⁵⁰⁷ and some to consider them remedial.⁵⁰⁸ Others appear to take what may be the most logical view and regard such laws as both remedial and penal.⁵⁰⁹

⁴⁹⁸ U.S. ex rel. Demarois v Farrell, 87 Fed. (2) 957.

⁴⁹⁹ State v West Plains Telephone Co., 232 Mo. 579, 135 S.W. 20.

⁵⁰⁰ Mechanics', etc. Mut. Savings Bank v Allen, 28 Conn. 97; Alston v American Mortgage Co., 116 Ohio St. 643, 157 N.E. 374.

⁵⁰¹ Ibid.

⁵⁰² Ibid.

⁵⁰³ Moll v Lafferty, 302 Pa. 354, 153 Atl. 557.

⁵⁰⁴ Van Noy v Goldberg, 98 Calif. Ap. 604, 277 Pac. 538.

⁵⁰⁵ McArthur v Schenck, 31 Wis. 673.

⁵⁰⁶ Carozza v Fed. Finance & Credit Co., 149 Md. 223, 131 Atl. 332, 43 A.L.R. 1.

⁵⁰⁷ Hemple v Raymond, 144 Fed. 796; Partch v Krogman, 202 Iowa 524, 210 N.W. 612; McTavish v Green, 220 Mich. 606, 190 N.W. 736; Auburn Nat. Bank v Lewis, 75 N.Y. 516. They are penal where they prescribe for the forfeiture of interest. Coble v Shoffner, 75 N.C. 42.

⁵⁰⁸ Law, Clark & Co. v Mitchell, 200 Ala. 565, 76 So. 923. But usury statutes should not be retroactive. Lankford v Holton (Ga.) 200 S.E. 243.

⁵⁰⁹ Tobin v Neuman (Mo.) 271 S.W. 842. Also see Farmers, etc. Bank v Dearing, 91 U.S. 29, 23 L.Ed. 196, and Ordway v Cent. Nat. Bank, 47 Md. 217.

Nevertheless, usury statutes, if they are regarded as penal, should be strictly construed,⁵¹⁰ at least where there is an attempt to enforce any of the penal provisions,⁵¹¹ whether such provisions impose punishment or forfeitures.⁵¹² If the statutes are considered remedial, they would seem entitled to a liberal construction in favor of their object or purpose,⁵¹³ especially where no penal provision is involved. Even other reasons exist in favor of a liberal construction of usury statutes. One may wonder whether such laws are so closely connected with the public welfare, as to simply demand a liberal construction for that reason alone. Perhaps the penal features constitute merely a secondary purpose; the primary purpose being to protect the necessitous borrower against an exhortion.⁵¹⁴

But be that as it may, the primary purpose is to ascertain the legislative intent⁵¹⁵—just as that is the purpose of all construction. Consequently, the court may resort to the usual rules of construction. For instance, the court should give due regard to the mischief sought to be remedied,⁵¹⁶ and the benefits sought to be attained.⁵¹⁷ The statute should be construed in its entirety,⁵¹⁸ and even statutes in *pari materia* given due consideration.⁵¹⁹ And

⁵¹⁰ *Partch v Krogman*, 202 Iowa 524, 210 N.W. 612; *McTavish v Green*, 220 Mich. 606, 190 N.W. 736; *Byrd v Link-Newcomb*, 118 Miss. 179, 79 So. 100. If they are regarded in derogation of the common law, should they not for that reason be strictly construed? *Alston v American Mortgage Co.*, 116 Ohio St. 643, 157 N.E. 374.

⁵¹¹ *Automobile Sec. Corp. v Randazza*, 17 La. Ap. 489, 135 So. 45.

⁵¹² *Byrd v Link-Newcomb*, 118 Miss. 179, 79 So. 100.

⁵¹³ *Keim v Vette*, 167 Mo. 389, 67 S.W. 223; *Missouri Discount Corp. v Mitchell*, 216 Mo. Ap. 100, 261 S.W. 743. Also see *Eaker v Bryant*, 24 Calif. Ap. 87, 140 Pac. 310. "It is apparent upon an examination of the books that opinions as to the morality and policy of usury laws have frequently led to their being construed and refined away. The crafty means contrived by the wit and greed of man to evade the law have too often been successful, only because the private opinions and sympathies of courts and juries have interfered with its just and general enforcement." *In re Pittock*, 19 Fed. Cas. No. 11,189.

⁵¹⁴ *Stark v Bauer Cooperate Co.*, 3 Fed. (2) 214.

⁵¹⁵ *Hemple v Raymond*, 144 Fed. 796; *Ex parte Berger*, 193 Mo. 16, 90 S.W. 759.

⁵¹⁶ *Lafayette v Lewis*, 7 Ohio 80.

⁵¹⁷ *McArthur v Schenck*, 31 Wis. 673.

⁵¹⁸ *Vermont Loan & Trust Co. v Whithed*, 2 N.D. 82, 49 N.W. 318.

⁵¹⁹ *Ex parte Washer*, 200 Calif. 598, 254 Pac. 951.

where a general law and a special law conflict beyond reconciliation, in accord with the usual rule, the former must give way to the latter.⁵²⁰ Yet a general usury law will apply to loans of every kind,⁵²¹ just as it will include both natural and artificial persons within its scope and operation.⁵²²

§ 364. Small Loan Acts.—Acts of this character are generally exceptions from the general usury laws, so that the lender may legally charge a rate of interest higher than the normal rate.⁵²³ In fact, where a statute provided for the creation of corporations authorized to make small loans at a rate of interest in excess of that allowed by the general law, the two pieces of legislation must be construed together, and only where the two cannot stand together, will the general law be modified.⁵²⁴ Moreover, it would appear that the small loan law should be construed liberally in favor of the borrower and strictly as to the interests of the lender.⁵²⁵ At least, statutes of this type are to be given that meaning which will best express the intention of the legislature.⁵²⁶ Such a construction will usually require a construction broad enough to prevent any possible evasion of the requirements of the law.⁵²⁷ Inasmuch as the small loan acts are exceptions to the general interest laws, and in a manner are in derogation of common right, might well be urged as grounds for subjecting such laws to a strict construction against the lender.

§ 365. Initiative and Referendum.⁵²⁸—Statutes pertaining to these two legislative processes, since they come into existence by

⁵²⁰ *Ritenour v Harrison*, 57 Mo. 502.

⁵²¹ *Ritenour v Harrison*, 57 Mo. 502.

⁵²² *Ritenour v Harrison*, 57 Mo. 502; *Farmers Bank v Burchard*, 33 Vt. 346.

⁵²³ *Lowry v Collateral Loan Assoc.*, 172 N.Y. 633, 65 N.E. 1119, 172 N.Y. 394, 65 N.E. 206.

⁵²⁴ *Ibid.* Also note *Beneficial Loan Soc. v Haight*, 215 Calif. 506, 11 Pac. (2) 857, where a statute which authorized a personal property broker making loans to charge an increased rate of interest, was invalidated in so far as it conflicted with a general usury law adopted as an initiative measure.

⁵²⁵ *In re Comm.*, 28 Pa. Dist. 236.

⁵²⁶ *Gibbs-Hargrave Shoe Co. v Peek*, 212 Ala. 633, 103 So. 672.

⁵²⁷ *Ibid.*

⁵²⁸ For other treatment of the Initiative and Referendum, see §§ 47-67, *supra*.

virtue of constitutional provisions, must be construed in the light of the constitution.⁵²⁹ Moreover, since such statutes are passed in order to carry the constitutional provisions into effect, they must be liberally construed so as to promote the purpose of their enactment.⁵³⁰ And the requirements prescribed by statutes relating to the initiative and the referendum, will usually be considered as mandatory so far as the duties of officials are concerned.⁵³¹

Of course, where the law subject to construction is one which has been initiated by the people and duly adopted by them at an election held for that purpose, the problem of the legislative intent, as such, drops from the picture. In place of the legislative intent, the collective intent of the people becomes the object of the court's search when it is called upon to construe a law thus adopted by the vote of the people.

Obviously, the problem is similar in practically all of its aspects whether the statute is passed by the people directly or by their representatives in the legislature. If there is any great difference, it will be found in the increased perplexity of the problem where an initiated measure is involved, particularly where the court resorts to considerations beyond the language of the statute itself in its effort to discover the meaning thereof. Yet, it is difficult to see why the court might not resort to the same sources for assistance, that is, to the sources which correspond with those constituting proper reservoirs of the legislative intent where statutes passed by the legislature are concerned. The language will still be the primary source from which to ascertain the statute's meaning. And in seeking to ascertain that meaning, the usual rules of construction will be applicable. In fact, the extent to which the courts will go in their efforts to ascertain the meaning of an initiated measure, is indicated in *People v Fore*, 84 Pac. (2) 326, where the arguments in favor of such measure by those advocating it and officially circulated to the voters at the election, were held legitimate aids to its interpretation.

⁵²⁹ *Campbell v City of Eugene*, 116 Ore. 264, 240 Pac. 418.

⁵³⁰ *State v Mack*, 134 Ore. 67, 292 Pac. 306. Also see *State v Perrault*, 34 N.M. 438, 283 Pac. 902.

⁵³¹ *State v Carter*, 257 Mo. 52, 165 S.W. 773; *Norris v Cross*, 25 Okla. 287, 105 Pac. 1000.

§ 366. **Declaratory Judgments.**⁵³²—The statutes establishing the relatively recent judicial proceedings whereby the courts will pronounce declaratory judgments upon cases of a specified character, are remedial in their nature⁵³³ and pertain to procedure.⁵³⁴ In other words, the declaratory judgment act does not create any new substantive rights or legal relationships but only adds to the remedies previously existing, an additional one for relief in the form of a judgment declaring in cases of actual controversy the rights and duties of the parties thereto.⁵³⁵

The purpose of the declaratory judgment act is primarily to relieve litigants of the common law rule that no declaration of rights may be judicially adjudged, unless a right has been violated for the violation of which relief may be granted.⁵³⁶ Or, as was stated with reference to the Uniform Declaratory Judgment law, one essential purpose is to enable the proper parties to obtain a determination of their rights and duties in proper cases before litigation might possibly arise, with respect to specific transactions.⁵³⁷

Inasmuch as declaratory judgment statutes are remedial, they are entitled to a liberal construction;⁵³⁸ they should be liberally construed to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and

⁵³² For a general discussion of the construction of declaratory judgment acts, see Notes in 12 A.L.R. 84, and 19 A.L.R. 1132.

⁵³³ *Walker v Walker*, 132 Ohio St. 137, 5 N.E. (2) 405.

⁵³⁴ *Aetna Cas. & Surety Co. v Quarles*, 92 Fed. (2) 321.

⁵³⁵ *Davis v American Foundry Equipment Co.*, 94 Fed. (2) 441.

⁵³⁶ *DeCharette v St. Matthews Bank*, 214 Ky. 400, 283 S.W. 410, 50 A.L.R. 34. As to the purpose of such acts, also see *In re Cryan*, 301 Pa. 386, 152 Atl. 675, 71 A.L.R. 1417, and the note in 68 A.L.R. 112, 115, 87 A.L.R. 1211.

⁵³⁷ *McNichols v Denver*, 101 Colo. 316, 74 Pac. (2) 99; also see *National Trans. Co. v Toquet*, 123 Conn. 468, 196 Atl. 344; *Rodgers v Webster*, 266 Ky. 679, 99 S.W. (2) 781.

⁵³⁸ *Walker v Walker*, 132 Ohio St. 137, 5 N.E. (2) 405. Also see *Sullivan v Ideal Bldg. & Loan Assoc.*, 313 Pa. 407, 170 Atl. 263, 98 A.L.R. 1. And the court will also place a liberal rather than a narrow interpretation upon the Federal Declaratory Judgment Statute. *Derman v Gersten*, 22 Fed. Supp. 877. The statute should be construed liberally in favor of effectuating its purpose, but strictly against encroachment on the jurisdiction of the state courts and against prolongation and increase of litigation. *Maryland Cas. Co. v Consumers Finance Co.*, 23 Fed. Supp. 433.

insecurity from legal relationships without awaiting the violation of rights or the disturbance of relationships.⁵³⁹

The remedy prescribed by such statutes is an exclusive one after it has been invoked.⁵⁴⁰ And it is a discretionary proceeding so far as the courts are concerned.⁵⁴¹

Such statutes have frequently been subjected to the interpretative process, and a few illustrations will indicate how they have been treated by the courts. For instance, a municipality was held to be a "person" in a statute which authorized any person whose rights were affected by a municipal ordinance to resort to the declaratory judgment.⁵⁴² Similarly, the word will also include the state.⁵⁴³ And the word "actual" in the term "actual controversy" is a word of emphasis rather than of definition.⁵⁴⁴ Moreover, an "actual controversy" exists where the differences between the parties concerned as to their legal rights have reached the stage of antagonistic claims which are being actively pressed on one side and opposed on the other.⁵⁴⁵ And, in this connection, the right of an insurer under an accident policy to be immune from the claims made by a beneficiary, falls within the scope of a "right" covered by the declaratory judgment statute.⁵⁴⁶

⁵³⁹ *Aetna Cas. & Surety Co. v Quarles*, 92 Fed. (2) 321.

⁵⁴⁰ *Stephenson v Equitable L. Assur. Soc.*, 92 Fed. (2) 406.

⁵⁴¹ *Washington-Detroit Theatre Co. v Moore*, 249 Mich. 673, 229 N.W. 618; *Heller v Shapiro*, 208 Wis. 310, 242 N.W. 174. Also see *U.S. Fidelity & Guar. Co. v Pierson*, 21 Fed. Supp. 678.

⁵⁴² *Bay v Gelvick*, 58 Ohio Ap. 51, 15 N.E. (2) 786.

⁵⁴³ *State ex rel. Smrha v General American L. Ins. Co. (Neb.)* 272 N.W. 555.

⁵⁴⁴ *Aetna L. Ins. Co. v Haworth*, 57 S.Ct. 461, reh. den. 57 S.Ct. 667.

⁵⁴⁵ *Sullivan v Ideal Bldg. & Loan Assoc.*, 313 Pa. 407, 170 Atl. 263, 98 A.L.R. 1.

⁵⁴⁶ *Columbian Nat. L. Ins. Co. v Foulke*, 89 Fed. (2) 261.

CHAPTER XXXI

STATUTORY RULES FOR CONSTRUCTION OF STATUTES

- § 367. In General.
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- § 369. Statutory Rules for Construction of Statutes in Massachusetts with
Reference to Other States with Identical or Similar Statutes.
- § 370. The Legislative Intent and Context of the Statute.
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- § 421. Retroactive Operation, Generally.
- § 422. Retroactive Operation—Offenses, Indictments, Penalties, etc.
- § 423. Retroactive Operation—Contracts and Procedure.
- § 424. Intent of the Legislature.
- § 425. Reason and Spirit of the Law.
- § 426. Context.
- § 427. Statutes in *Pari Materia*.
- § 428. Natural Rights.
- § 429. Section Headings and Headlines.
- § 430. Grammatical Errors.
- § 431. Strict Construction of Statutes Enjoining or Directing Acts.

§ 367. In General.—An examination of the statutes of the various states reveals that it is a common legislative practice to enact rules for the construction of statutes. Sometimes such rules will be made applicable to all statutes; sometimes they will be applicable to specific statutes or codes. But in either case, they seem to have two predominating purposes: (1) to declare what the law is, and (2) to correct a construction that seems erroneous to the legislature.

As is thus apparent, these rules are important factors in the construction of statutes, and they are entitled to consideration whenever a statute to which they are applicable, is subjected to the process of interpretation by the court.¹ In fact, in many instances, they may control the construction.² Nevertheless, if avoidable,

¹ *Bull v Loveland* (Mass.) 19 Pick. 9; *Salters v Tobias* (N.Y.) 3 Paige Ch. 338.

² *Arnett v State*, 168 Ind. 180, 80 N.E. 153; *State ex rel. Trustees v Trustees etc. Orphans Home*, 37 Ohio St. 275.

they should not be allowed to operate retrospectively if thereby they will impair or destroy vested rights,³ although retroactive operation is not necessarily seriously objectionable if no constitutional rights are violated.⁴ On the other hand, prospective operation seems generally to be unobjectionable,⁵ as is true with all legislation.

Yet, the power, as we have already stated,⁶ resting in the legislature to prescribe legal definitions or to announce rules of construction, cannot invade the field of the judiciary.⁷ This obviously would violate the tri-partite theory of government and actually permit the legislature to exercise the judicial power of interpretation. Herein lies the danger of allowing statutory rules of construction to operate retroactively. And besides, the same danger exists where such rules are allowed to operate prospectively, if they are regarded as absolutely binding upon the court. As a result, the proper sphere of statutory rules of construction would seem simply to be that of an indication of the legislative intent or as merely constituting a source from which the court may find some assistance in ascertaining the legislative intent.

It may be, however, that a statutory rule of construction will create a problem of construction more difficult than the one which calls for resort to the statutory rule. The statutory declaration may itself require construction.⁸ This factor alone would seem to justify the judicial attitude that statutory rules of construction should not be absolutely binding upon the court but should serve simply as a source from which to draw assistance in determining the legislative intent in a given case.

³ *Stebbins v Pueblo County*, 4 Fed. 282; *Koshkonong v Burton*, 104 U.S. 668, 26 L.Ed. 886; *State v Board of Comrs.*, 83 Kan. 199, 110 Pac. 92; *Haley v Philadelphia*, 68 Pa. St. 45.

⁴ *Stockdale v Atlantic Ins. Cos. (U.S.)* 20 Wall. 232, 22 L.Ed. 429; *State ex rel. Trustees v Trustees of etc. Orphans' Home*, 37 Ohio St. 275. Also see *McCleary v Babcock*, 169 Ind. 228, 82 N.E. 453. For further discussion, see § 278, *supra*.

⁵ *Stockdale v Atlantic Ins. Cos. (U.S.)* 20 Wall. 232, 22 L.Ed. 429; *U.S. v Claflin*, 97 U.S. 546, 24 L.Ed. 1082; *Titusville Iron Works v Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917, 1 L.R.A. 361.

⁶ See §§ 208-223, *supra*.

⁷ See § 13, *supra*; also § 92, note 57, *supra*.

⁸ In this connection note the interesting case of *Regina v Justices (Eng.)*, 7 Ad. & E. 480.

Moreover, the existence of a contrary meaning from that expressed by the declaratory statute will make the latter inapplicable.⁹ This would seem true, because in many instances the statute sought to be controlled by the declaratory statute will be the latest expression of the legislative intent. It would seem so, in other instances, because the declaratory statute may be a general law, while the statute subject to construction is more specific. And in addition to these possible reasons, the language of the statute under consideration by the court would seem to be the primary source from which to ascertain that statute's meaning. But, the court in its effort to ascertain whether a contrary meaning exists, may properly subject the declaratory statute to a strict construction and refuse to give it a scope in excess of that clearly required by its language.¹⁰

§ 368. Substantial Uniformity of General Statutory Rules of Construction.—As will be hereafter revealed,¹¹ a comparison of the provisions of the general interpretation statutes of the several states reveals two or three interesting facts. In the first place, we find a remarkable trend toward uniformity. While the language may not always be the same, its import will be substantially identical. Indeed, in a large number of states, the language will actually be the same. Other states, however, may have statutes which are more detailed or comprehensive in that more terms are defined or more rules of construction are announced. But regardless of their scope, one will be impressed with the similarity of the most important provisions.

A second fact of considerable interest is revealed by those provisions which declare the law. In many instances, such provisions simply state the rule of law announced by the courts in their decisions, with the result that the general principles pertaining to the construction of statutes everywhere are in effect codified. In other words, the statutes will simply state the rules of law already declared and applied by the courts. Where this is the case, obviously, the statute has very little, if any, effect upon the judicial attitude.

⁹ *Von Weise v Comm. Int. Revenue*, 69 Fed. (2) 439; *Ryan v State* (Ind.) 92 N.E. 340.

¹⁰ *Alabama Warehouse Co. v Lewis*, 56 Ala. 514; also see *supra*, §§ 199 and 211.

¹¹ See § 369, *infra*.

A third fact revealed by a comparison of the various statutory rules of construction relates to the efforts of the legislature to correct constructions which it has deemed erroneous and to substitute new rules of construction for existing ones. In this connection, there have been several important alterations or substitutions indicative of an attempt upon the part of the legislatures to improve existing law as it pertains to the construction of statutes. Even though the new rules of construction are not absolutely binding upon the courts, yet simply by evidencing a legislative intent to change or to modify existing rules, the desired changes are generally produced, at least substantially.

All of the foregoing facts are revealed by the provisions of the general construction statutes of Massachusetts, hereafter set forth in verbatim, as typical or largely representative of statutes pertaining to the construction of statutes. Other states with similar, or substantially similar provisions are noted in the footnotes with appropriate citations. Additional sections will be found setting forth statutory rules common to many states but not found in the laws of Massachusetts.

§ 369. Statutory Rules for Construction of Statutes in Massachusetts With References to Other States With Identical or Similar Statutes.—In order to illustrate the substantial uniformity of the various statutory rules of construction, as well as to indicate the exact language of such rules in a state which has enacted statutory rules largely representative of such rules generally, the various statutory provisions of the state of Massachusetts, as we have already stated, except those peculiar to such state, are set forth in verbatim in the following sections.¹²

§ 370. The Legislative Intent and Context of the Statute.—“In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same statute.¹³

¹² §§ 370-392, *infra*.

¹³ Mass. Gen. Laws, 1932, Ch. 4, § 6. For similar provisions, see: Rev. Code Dela. 1935, Ch. 1, § 1; Ga. Code, 1933, § 102-103; Ill. Rev. Stat. (Smith-Hurd), 1935, Ch. 131, § 1; Anno. Stat. Ind. (Burns), 1926, § 247; Code of Iowa, 1935, § 63; Kan. Gen. Stat. 1935, § 77-201; Carroll's Ky. Stat. 1930, § 446; La.

§ 371. **Revival.**—“**First.** The repeal of a statute shall not revive any previous statute except in case of the repeal of a statute, after it has become law, by the vote of the people, upon its submission by referendum petition.”¹⁴

§ 372. **Retroactive Effect.**—“**Second.** The repeal of a statute shall not affect any punishment, penalty, or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offense committed, or for Civ. Code Anno. (Dart), 1932, Art. 22; Rev. Stat. Me. 1930, Ch. 1, § 6; Comp. L. Mich. 1929, § 76; Mason's Minn. Stat. 1927, § 10932; R. S. Mo. 1929, § 655; Rev. Code Mont., 1935, § 96; Pub. L. N.H., 1926, Ch. 2, § 1; N.M. Stat. Anno., 1929, § 139-102; N.C. Code Anno., 1931, § 3949; R.I. Gen. Laws 1923, § 401; Code of Laws, S.C., 1932, § 2080; Rev. Civ. Stat. Tex., 1925, Art. 10; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt., 1933, § 1; Code of Va., 1930, § 5; Code of W.Va., 1932 (Anno.), § 33; Wis. Stat., 1937, § 370.01; Wyo. Rev. Stat., 1931, § 112-101. This section states the rule for construction of statutes as laid down by the legislature itself. London Guarantee etc. Co. v Coffeen, 96 Colo. 375, 42 Pac. (2) 998.

¹⁴ Mass. Gen. Laws, 1932, Ch. 4, § 6. For similar provisions, see: U.S. C.A., § 28, Ch. 2, Title 1; Ala. Code, 1927, Ch. 1, § 15; Rev. Code Ariz., 1928, Ch. 73, § 3042; Dig. Stat. Ark. (Pope), 1937, § 13282; Colo. Stat. Anno., 1935, Ch. 159, § 3; Gen. Stat. Conn., 1930, § 6568; Comp. Gen. Laws, Fla., 1927, Art. 2, § 90; Ida. Code Anno., 1932, § 70-115; Ill. Rev. Stat. (Smith-Hurd), 1935, Ch. 131, § 3; Anno., Ind. Stat. (Burns) 1926, § 255; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Carroll's Ky. Stat., 1931, § 464; Comp. Laws Mich., 1929, § 77; Mason's Minn. Stat., 1927, § 10930; Pub. L., N.H., 1926, Ch. 2, § 37; N.M. Stat. Anno., 1929, § 139-104; Consol. L. N.Y. (Cahill's), 1930, § 23:90; N.C. Comp. L. 1913, § 7315; Code of Ohio (Baldwin), 1930, § 25; Okla. Stat., 1931, § 7; R.I. Gen. L. 1923, § 418; Rev. Stat. Utah, 1933, § 88-2-5; Pub. L. Vt., 1933, § 33; Code of Va., 1930, § 5; Code of W.Va., 1932, Anno., § 32; Wis. Stat., 1937, § 370.01; Wyo. Rev. Stat., 1931, § 112-103. And see *People v Hendrick*, 93 Colo. 512, 27 Pac. (2) 493; *Columbia Ry. Gas Co. v Carter*, 127 S.C. 473, 121 S.E. 377. The rule was otherwise at common law. *White River Lumber Co. v Drainage Dist.* (Ark.) 216 S.W. 1043, and *Baum v Thomo*, 150 Ind. 378, 50 N.E. 357. But repeal of initiated law does not revive prior laws. *Armstrong v Mitten*, 95 Colo. 425, 37 Pac. (2) 757. And mere reference to title is not sufficient to revive. *Florer v State*, 133 Ind. 453, 32 N.E. 829. This section enacts merely a rule of construction, *Jacksonville etc. R. Co. v U.S.*, 118 U.S. 626, 30 L.Ed. 273, 7 S.Ct. 48, and applies to statutes and not the common law. *State v Mines*, 38 W.Va. 125, 18 S.E. 470. It also applies to repeals by implication. *Milne v Huber*, 17 Fed. Cas. No. 9617.

the recovery of a penalty, or forfeiture incurred, under the statute repealed." ¹⁵

§ 373. Non-Technical and Technical Words.—"Third. Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." ¹⁶

¹⁵ Mass. Gen. Laws, 1932, Ch. 4, § 6. States with similar provisions: U.S. C.A., § 29, Ch. 2, Title 1; Ala. Code, 1923, Ch. 1, § 10; Rev. Code Ariz., 1928, Ch. 73, § 3046; Colo. Stat. Ann. 1935, Ch. 159, § 4; Gen. Stat. Conn., 1930, § 6568; Ida. Code Anno. 1932, § 70-106; Ill. Rev. Stat. (Smith-Hurd), 1935, Ch. 131, § 4; Ind. Stat. Anno. (Burns) 1926, § 255; Kan. Gen. Stat. 1935, § 77-201; Carroll's Ky. Stat. 1930, § 465; Rev. Stat. Me. 1930, Ch. 1, § 4; Comp. Stat. Neb. 1929, §§ 81 and 7101; Pub. L. N.H., 1926, Ch. 2, §§ 35 and 36; Consol. L. N.Y. (Cahill) 1930, § 23:93, 94; N.D. Comp. L. 1913, § 7316; Code of Ohio (Baldwin) 1930, § 26; R.I. Gen. L. 1923, § 416; Comp. L. S.D. (1929), § 10658, Code of Tenn. 1932, § 12; Code of Va. 1930, § 5; Code of W.Va. 1932 (Anno.), § 31; Wis. Stat. 1937, § 370.01; Wyo. Rev. Stat. 1931, § 112-104. And see *Lamar v U.S.*, 260 U.S. 711, 67 L.Ed. 476, 43 S.Ct. 251; *Cloud v State*, 36 Ark. 151; *Peo. ex rel. v David* (Ill.) 168 N.E. 264. This section abrogates the rule that rights under statutes repealed by subsequent law without saving clause are lost. *Cavanaugh v Patterson*, 41 Colo. 158, 91 Pac. 1117. And since laws of one legislature do not bind another, this section must be taken as merely a rule of construction, having no application where the legislative intent appears clearly to the contrary. *Dyer v Ellington*, 126 N.C. 941, 36 S.E. 177. This statute becomes a part of every repealing act that does not specifically state that it is to have a retrospective effect. *State v Brown*, 146 Kan. 525, 73 Pac. (2) 19.

¹⁶ Mass. Gen. Laws, 1932, Ch. 4, § 6. For similar statutes, see: Rev. Code Ariz., 1928, Ch. 73, § 3040; Pol. Cod. Calif. (Deering), 1931, § 16; Colo. Stat. Ann., 1935, Ch. 159, § 2; Gen. Stat. Conn., 1930, § 6568; Dela. Rev. Code, 1935, Ch. 1, § 1; Ga. Code, 1933, § 102-102; Ida. Code Ann., 1932, § 70-113; Ind. Stat. Anno. (Burns), 1926, § 247; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Carroll's Ky. Stat. 1930, § 460; Dart, La. Civ. Code. Ann., 1932, §§ 14 and 15; Rev. Stat. Me. 1930, Ch. 1, § 6 (including provision that "and" and "or" are controvertible); Comp. L. Mich. 1929, § 76; Mason's Minn. Stat., 1927, § 10932; Miss. Code Ann., 1930, § 1394; R. S. Mo. 1929, § 655; Pub. L. N.H., 1926, Ch. 2, § 2; Rev. Stat. N.J., 1937, § 1:1-1; N.M. Stat. Ann., 1929, § 139-102; N.D. Comp. L. 1913, § 7278; Stat. Okla., 1931, § 24; Rev. Civ. Stat. Tex., 1925, Art. 10; Rev. Stat. Utah, 1933, § 88-2-11; Wis. Stat., 1937, § 370.01; Wyo. Rev. Stat., 1931, § 112-101. And see *Owen v Going*, 13 Colo. 290, 22 Pac. 768. This section is declaratory of the common law on the subject. *Bailey v Common*, (Ky.) 11 Bush. 688.

§ 374. **Gender, and Number.**—“**Fourth.** Words importing the singular may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter.”¹⁷

§ 375. **Joint Authority.**—“**Fifth.** Words purporting to give joint authority to, or direct any act by, three or more public officers or other persons, shall be construed as giving such authority to,

¹⁷ Mass. Gen. Laws, 1932, Ch. 4, § 6. For states with similar provisions, see: U.S. C.A., § 571, Ch. 15, Title 18, and § 1, Ch. 1, Title 1; Code of Ala. 1923, Ch. 1, § 1; Rev. Code Ariz. 1928, Ch. 73, § 3040; Digest Stat. Ark. (Pope) 1937, § 13258; Pol. Code Calif. (Deering) 1931, § 17; Colo. Stat. Ann. 1935, Ch. 159, § 2; Gen. Stat. Conn. 1930, § 6568; Rev. Code Dela. 1935, Ch. 1, § 1; Ga. Code 1933, § 102-102; Ida. Code Ann. 1932, § 70-114; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Ind. Stat. Anno. (Burns) 1926, §§ 247 and 901; Code of Iowa, 1935, § 63; Kan. Gen. Stat. 1935, § 77-201; Carroll's Ky. Stat. 1930, § 457; Rev. Stat. Me. 1930, Ch. 1, § 6; Anno. Code Md. 1924, Art. 1, §§ 7 and 8; Comp. L. Mich. 1929, § 76; Mason's Minn. Stat. 1927, § 10932; Miss. Code Ann. 1930, §§ 1395 and 1396; R.S. Mo. 1929, § 651; Comp. Stat. Neb. 1929, §§ 81 and 6903; Pub. L. N.H. 1926, Ch. 2, § 3; Rev. Stat. N.J. 1937, § 1; 1-2; N.M. Stat. Ann. 1929, § 139-102; N.C. Code Ann. 1931, § 3949; N.D. Comp. L. 1931, §§ 7307, 7308; Code of Ohio (Baldwin) 1930, § 10213; Stat. Okla. 1931, §§ 30 and 33; R.I. Gen. L. 1923, §§ 402 and 403; Code of Laws, S.C. 1932, § 2081; Code of Tenn. 1932, § 14; Rev. Civ. Stat. Tex. 1925, Art. 10; Rev. Stat. Utah 1933, § 88-2-12; Pub. L. Vt. 1933, § 25; Code of Va. 1930, § 5; Code of W.Va. Ann. 1932, § 33; Wis. Stat. 1937, § 370.01; Comp. Stat. Wash. (Remington) 1932, § 148. And see *Boone County v Keck*, 31 Ark. 387; *State v Holder*, 49 Idaho 514, 290 Pac. 287 (plural and singular); *Greanleaf v Woods (Ky.)* 96 S.W. 458 (singular may include plural); *In re Eikel*, 283 Fed. 285. The purpose of this section was to avoid the use of such expressions as “such person or persons”, “he, she or they”, “himself or themselves”, found in some poorly drawn statutes. *Von Glahn v Harris*, 73 N.C. 323. This statute should be applied only in order to carry out the legislative intent. *First National Bank v State of Mo.*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486. Consequently, a statute may be clearly applicable to males only. *In re Maddox*, 93 Md. 727 (admission to bar). “Juror” held to embrace both women and men. *People v Bartz*, 212 Mich. 580, 180 N.W. 423. Will of a woman construed to be the “will of a person leaving his widow.” *In re Roton*, 95 S.C. 118, 78 S.E. 711.

or directing such act by, a majority of such officers or persons.”¹⁸

§ 376. Definitions, Generally.—“In construing statutes the following words shall have the meaning herein given, unless a contrary intention clearly appears.”¹⁹

§ 377. Fiscal Year.—“**Ninth.** ‘Fiscal year,’ when used with reference to the commonwealth or any of its offices, departments, boards, commissions or institutions shall mean the year beginning December 1st and ending with the following November 30th, both inclusive.”²⁰

§ 378. Grantor.—“**Eleventh.** ‘Grantor’ may include every person from or by whom a freehold estate or interest passes in or by any deed; and ‘grantee’ may include every person to whom such estate or interest so passes.”²¹

¹⁸ Mass. Gen. Laws, 1932, Ch. 4, § 6. Also see: Code of Ala. 1923, Ch. 1, § 3; Rev. Code Ariz. 1928, Ch. 73, § 3040; Pol. Code Calif. (Deering) 1931, § 15; Gen. Stat. Conn. 1930, § 6568; Ga. Code 1933, § 102-102; Ida. Code Ann. 1932, § 70-112; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Code of Iowa, 1935, § 63; Kan. Gen. Stat. 1935, § 77-201; Carroll's Ky. Stat. 1930, § 448; Rev. Stat. Me. 1930, Ch. 1, § 6; Comp. L. Mich. 1929, § 76; Mason's Minn. Stat. Ann. 1927, § 10932; R.S. Mo. 1929, § 655; Pub. L. N.H., 1926, Ch. 2, § 15; N.M. Stat. Ann., 1929, § 139-102; Code of N.C. 1931 (Anno.) § 3949; N.D. Comp. L. 1913, § 7314; Stat. Okla. 1931, § 32; R.I. Gen. L. 1923, § 404; Code of Tenn., 1932, § 22; Rev. Civ. Stat. Tex. 1925, Art. 10; Rev. Stat. Utah, 1933, § 88-2-10; Pub. L. Vt., 1933, § 16; Code of Va., 1930, § 5; Wis. Stat. 1933, § 370.01; Wyo. Rev. Stat. 1931, § 112-101; Code of W.Va. 1932 (Anno.) § 33. And see *Metsker v Whitsell*, 181 Ind. 126, 103 N.E. 1078, and *Blevins v Morledge & Allen*, 5 Okla. 141, 47 Pac. 1068. This section refers only to the construction of statutes and to public officers and other persons deriving authority from a statutory source. *Fraley v Nickels*, 121 Va. 377, 93 S.E. 636. This statute applies unless a contrary intention appears by express words or by clear implication. *Carpenter v Hale*, 159 Ky. 465, 167 S.W. 426.

¹⁹ Mass. Gen. L. 1932, Ch. 4, § 7. Also see: Ind. Stat. Ann. (Burns) 1926, § 900; Mason's Minn. Stat. 1927, § 10933; Rev. Stat. N.J., 1937, §§ 1:1-1 and 1:1-2.

²⁰ Mass. Gen. L., 1932, Ch. 4, § 7. Also see: Code of W.Va., 1932 (Anno.) § 27.

²¹ Mass. Gen. L., 1932, Ch. 4, § 7. Also see: Rev. Code Ariz., 1928, Ch. 72, § 3040; Dela. Rev. Code, 1935, Ch. 1, § 1; Carroll's Ky. Stat. 1930, § 461; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Pub. L. N.H., 1926, Ch. 2, § 16; Pub. L. Vt. 1933, § 12; Wis. Stat. 1937, § 370.01.

§ 379. Highway, Public Way, etc.—“Twelfth. ‘Highway,’ ‘townway,’ ‘public way’ or ‘way’ shall include a bridge which is a part thereof.”²²

§ 380. Insane Person—Lunatic, etc.—“Fifteenth. ‘Insane person’ and ‘lunatic’ shall include every idiot, non compos, lunatic and insane and distracted person.”²³

§ 381. “Issue.”—“Sixteenth. ‘Issue’ as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor.”²⁴

§ 382. Land, Real Estate, etc.—“Seventeenth. ‘Land,’ ‘lands,’ and ‘real estate’ shall include lands, tenements and hereditaments, and all rights thereto and interest therein; and ‘recorded’ as applied

²² Mass. Gen. L., 1932, Ch. 4, § 7. Also see: Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Code of Iowa, 1935, § 63; Kan. Gen. Stat. 1935, § 77-201; Rev. Stat. Me., 1930, Ch. 1, § 6; Mason's Minn. Stat., 1927, § 10933; Pub. L. N.H. 1926, Ch. 2, § 26; Code of Tenn., 1932, § 23; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt. 1933, § 13; Wis. Stat. 1937, § 370.01.

²³ Mass. Gen. Laws, 1932, Ch. 4, § 7. For states with similar provisions, see: U.S. C.A., § 1, Ch. 1, Title 1; Rev. Code Ariz., 1928, Ch. 73, § 3040; Digest Stat. Ark. (Pope) 1937, § 13272; Colo. Stat. Ann. 1935, Ch. 159, § 2; Dela. Rev. Code, 1935, Ch. 1, § 1; Ga. Code, 1935, § 102-103; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 31, § 1; Ind. Stat. Anno. (Burns) 1926, § 900; Code of Iowa, 1935, § 63; Kan. Gen. Stat. 1935, § 77-201; Carroll's Ky. Stat. 1930, § 450; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, § 1390; Consol. L. N.Y., 1930 (Cahill) § 23:28; R.I. Gen. L., 1923, § 406; Code of Tenn., 1932, § 14; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt., 1933, § 14; Code of Va., 1930, § 5; Code of W.Va., 1932 (Anno.), § 33; Wis. Stat., 1937, § 370.01.

²⁴ Code of Ala., 1923, Ch. 1, § 1; Rev. Code Ariz., 1928, Ch. 73, § 3040; Colo. Stat. Ann., 1935, Ch. 159, § 2; Dela. Rev. Code, 1935, Ch. 1, § 1 (“kin and kindred”); Code of Iowa, 1935, § 63; Gen. Stat. Kan., 1935, § 77-201; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; Pub. L. N.H. 1926, Ch. 2, § 20; Pub. L. Vt., 1933, § 15; Wis. Stat., 1937, § 370.01.

to plans, deeds or other instruments affecting land, shall, as affecting registered land, mean filed and registered.”²⁵

§ 383. Month and Year.—“Nineteenth. ‘Month’ shall mean calendar month, except when used in a statute providing for punishment, ‘one month’ or a multiple thereof shall mean a period of thirty days or the corresponding multiple thereof; and ‘year’ shall mean calendar year.”²⁶

²⁵ Mass. Gen. Laws, 1932, Ch. 4, § 7. For other states with similar provisions, see: Ala. Code, 1923, Ch. 1, § 2; Rev. Code Ariz., 1928, Ch. 72, § 3040; Digest Stat. Ark. (Pope) 1937, § 13261; Pol. Code Calif. (Deering), 1931, § 17 (2); Colo. Stat. Ann., 1935, Ch. 159, § 2; Dela. Rev. Code, 1935, Ch. 1, § 1; Ida. Code Ann., 1932, § 70-114; Ind. Stat. Anno. (Burns) 1926, § 900; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Carroll’s Ky. Stat., 1930, § 458; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason’s Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, § 1375; R.S. Mo., 1929, § 655; Pub. L. N.H., 1926, Ch. 2, § 21; Rev. Stat. N.J., 1937, § 1:1-2; Consol. Laws N.Y. (Cahill) 1930, § 23:40; N.D. Comp. L., 1913, § 7309; Stat. Okla., 1931, § 26; R.I. Gen. L., 1923, § 409; Code of Laws, S.C., 1932, § 897; Code of Tenn., 1932, § 15; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L., 1933, Vt., § 32; Code of Va., 1930, § 5; Code of W.Va. Ann., 1932, § 33; Wis. Stat., 1937, § 370.01. And see Walpoe v State Board, 62 Colo. 554, 163 Pac. 848.

²⁶ Mass. Gen. Laws, 1932, Ch. 4, § 7. For similar provisions, see: Ala. Code, 1923, Ch. 1, § 9; Rev. Code Ariz., 1928, Ch. 72, § 3040; Dig. Stat. Ark. (Pope) 1937, § 13274; Pol. Code Calif. (Deering) 1931, § 17 (4); Colo. Stat. Ann., 1935, Ch. 159, § 2; Gen. Stat. Conn., 1930, § 6568; Dela. Rev. Code, 1935, Ch. 1, § 1; Code of Ga., 1933, § 102-103; Ida. Code Ann., 1932, § 70-114; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Code of Iowa, 1935, § 63; Carroll’s Ky. Stat., 1930, § 452; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason’s Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, § 1377 and 1933; R.S. Mo., 1929, § 655; Pub. L. N.H., 1926, Ch. 2, § 8; Rev. Stat. N.J., 1937, § 1:1-2; Consol. Laws N.Y. (Cahill) 1930, § 23:31; N.C. Code Ann., 1931, § 3949; N.D. Comp. L., 1913, § 7305; Stat. Okla., 1931, § 39; R.I. Gen. L., 1923, § 411; Code of Tenn., 1932, § 16; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt. 1933, § 22; Code of Va., 1930, § 5; Code of W.Va., 1932 (Anno.) § 27; Wis. Stat., 1937, § 370.01; Comp. Stat. Wash., 1922 (Remington), § 149; Wyo. Rev. Stat., 1931, § 112-101. And see Daly v Concordia F. Ins. Co., 16 Colo. Ap. 349, 65 Pac. 416; Harpold v Doyle, 16 Idaho 671, 102 Pac. 158; Rice v Blair, 58 Ky. 680, 166 S.W. 180 (embraces leap year); Garfield v Hubbell, 6 Kan. Ap. 785, 59 Pac. 600 (year A.D.). The 29th of February is counted as one day in computing time of service of process. Helphenstine v Vincennes Bank, 65 Ind. 582. This section adopts the civil law’s method of computation. Satterwhite v Burrell, 51 N.C. 92.

§ 384. **Oath.**—"Twenty-first. 'Oath' shall include affirmation in cases where by law an affirmation may be substituted for an oath."²⁷

§ 385. **Person.**—"Twenty-third. 'Person' or 'whoever' shall include corporations, associations and partnerships."²⁸

²⁷ Mass. Gen. Laws, 1932, Ch. 4, § 7. Also see: U.S. C.A., § 1, Ch. 1, Title 1; Ala. Code, 1923, Ch. 1, § 1; Dig. Stat. Ark. (Pope), 1937, § 13273; Pol. Code Calif. (Deering) 1931, § 17; Gen. Stat. Conn., 1930, § 6568; Dela. Rev. Code, 1935, Ch. 1, § 1; Ga. Code, 1933, § 102-103; Ill. Rev. Stat. (Smith-Hurd), 1935, Ch. 131, § 1; Ind. Stat. Ann. (Burns) 1926, § 900; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Carroll's Ky. Stat., 1930, § 451; Rev. Stat. Me., 1930, Ch. 1, § 6; Md. Ann. Code, 1924, Art. 1, § 9; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, § 1379; Pub. L. N.H., 1926, Ch. 2, § 24; Rev. N.J. Stat., 1937, § 1:1-2; N.M. Stat. Ann., 1929, § 139-102; Consol. Laws N.Y. (Cahill), 1930, § 23:36; N.C. Code Ann., 1931, § 3949; N.D. Comp. L. 1913, § 7309; Code of Ohio (Baldwin) 1930, § 10213; Stat. Okla., 1931, § 26; R.I., Gen. L., 1923, § 410; Code of Tenn., 1932, § 14; Rev. Stat. Utah (1933) § 88-2-12; Pub. L. Vt., 1933, § 26; Code of Va., 1930, § 5; Code of W.Va., 1932 (Anno.) § 30; Wis. Stat., 1937, § 370.01; corporal oath and solemn oath, held synonymous. *Common v Jarboe*, 89 Ky. 143, 12 S.W. 138.

²⁸ Mass. Gen. Laws, 1932, Ch. 4, § 7: For similar statutory provisions, see: U.S. C.A., § 1, Ch. 1, Title 1; Code Ala., 1923, Ch. 1, § 1; Digest Stat. Ark. (Pope) 1937, § 13258; Pol. Code Calif. (Deering) 1931, § 17; Colo. Stat. Ann., 1935, Ch. 159, § 2; Gen. Stat. Conn., 1930, § 6568; Dela. Rev. Code, 1935, Ch. 1, § 1; Ga. Code, 1933, § 102-103; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Ind. Stat. Anno. (Burns) 1926, § 900; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Carroll's Ky. Stat., 1930, § 457; Rev. Stat. Me., 1930, Ch. 1, § 6; Md. Ann. Code, 1924, Art. 1, § 15; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, § 1381; Comp. Stat. Neb., 1929, § 81-6903; Pub. L. N.H., 1926, Ch. 2, § 9; Rev. Stat. N.J., 1937, § 1:1-2; N.M. Stat. Anno., 1929, § 139-102; Consol. Laws N.Y., 1930 (Cahill) § 23:37; N.C. Code Ann., 1931, § 3949; N.D. Comp. L., 1913, § 7294; Code of Ohio (Baldwin) 1930, § 10213; Stat. Okla., 1931, § 35; R.I. Gen. L., 1923, § 405; Code of Tenn., 1932, § 14; Rev. Stat., Utah, 1933, § 88-2-12; Pub. L. Vt., 1933, § 28; Code of W.Va., 1932 (Ann.) § 33; Wis. Stat., 1937, § 370.01; Comp. Stat. Wash., 1922 (Remington) § 146. And see *State v Lockie*, 43 Ida. 580, 253 Pac. 618. "Person" includes artificial as well as natural person. *Norris v State*, 25 Ohio St. 217. This section does not apply to municipal corporations. *Phillips v Baltimore*, 110 Md. 431. It may, however, include them. *City of Jackson v State* (Miss.) 126 So. 2. Thus, a county may be sued where "person" included "bodies corporate". *Donaldson v San Miguel*, 1 N.M. 263. The word "person" will also include "persons". *State v Dunn*, 134 N.C. 663, 46 S.E. 949. Where a corporation was held subject to income tax as a "person", see *Hattiesbury Gro. Co. v Robertson*, 126 Miss. 34, 88 So. 4, 25 A.L.R. 748.

§ 386. **Preceding and Following.**—"Twenty-fifth. 'Preceding' or 'following', used with reference to any section of the statutes, shall mean the section last preceding or next following, unless some other section is expressly designated in such reference." ²⁹

§ 387. **Spendthrift.**—"Thirtieth. 'Spendthrift' shall mean a person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery." ³⁰

§ 388. **State and United States.**—"Thirty-first. 'State,' when applied to the different parts of the United States, shall extend to and include the District of Columbia and the several territories; and the words 'United States' shall include said district and territories." ³¹

²⁹ Mass. Gen. Laws, 1932, Ch. 4, § 7. Also see: Ala. Code, 1923, Ch. 1, § 5; Rev. Code Ariz., 1928, Ch. 73, § 3040; Gen. Stat. Conn., 1930, § 6568; Ga. Code, 1933, § 102-103 (also defining "aforesaid"); Ind. Stat. Ann. (Burns) 1926, § 247; Carroll's Ky. Stat., 1930, § 462; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; R.S. Mo., 1929, § 650; Pub. L. N.H., 1926, Ch. 2, § 13; Code of N.C. (1931) Ann., § 3949; Pub. L. Vt. 1933, § 31; Code of Va., 1930, § 5; Code of W.Va., 1932 (Ann.) § 33; Wis. Stat., 1933, § 370.01; Wyo. Rev. Stat., 1931, § 112-101.

³⁰ Mass. Gen. Laws, 1932, Ch. 4, § 7. Also see Mason's Minn. Stat., 1927, § 109-33; Pub. L. N.H., 1926, Ch. 2, § 19.

³¹ Mass. Gen. Laws, 1932, Ch. 4, § 7. For similar provisions, see: Code Ala., 1923, Ch. 1, §§ 6 and 7; Rev. Code Ariz., 1928, Ch. 73, § 3040; Dig. Stat. Ark. (Pope) 1937, § 13271; Colo. Stat. Ann. 1935, Ch. 159, § 2; Dela. Rev. Code, 1935, Ch. 1, § 1; Ida. Code Ann. 1932, § 70-114; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Ind. Stat. Ann. (Burns) 1926, § 247; Code of Iowa, 1935, § 63; Kan. Gen. Stat. 1935, § 77-201; Carroll's Ky. Stat., 1930, § 446; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, §§ 1386, 1389; R.S. Mo., 1929, § 655; Pub. L. N.H., 1926, Ch. 2, § 4; Rev. Stat. N.J., 1937, § 1:1-2; Consol. Laws, N.Y. (Cahill) 1930, § 23:46; N.C. Code, 1931 (Anno.) § 3949; R.I. Gen. L. 1923, § 407; Code of Tenn., 1932, § 18; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt., 1933, § 37; Code of Va., 1930, § 5; Code of W.Va., 1932 (Ann.) § 33; Wis. Stat., 1937, § 370.01. And see *State v Briggs*, 116 Ind. 55, 18 N.E. 395 (Dist. Columbia).

§ 389. **Town.**—"Thirty-fourth. 'Town' when applied to towns or officers or employees thereof, shall include city." ³²

§ 390. **Written, In Writing, etc.**—"Thirty-eighth. 'Written' and 'in writing' shall include printing, engraving, lithographing, and any other mode of representing words and letters; but if the written signature of a person is required by law, it shall be by his own handwriting, or if he is unable to write, his mark." ³³

§ 391. **Population.**—"Forty-one. 'Population' when used in connection with the number of inhabitants of a county, city, town, or district, shall mean the population as determined by the last preceding state or national census." ³⁴

§ 392. **Computation of Time—Sunday—Holiday.**—"Except as otherwise provided, when the day or the last day for the performance of any act, including the making of any payment or tender of payment, authorized or required by statute or by contract, falls on

³² Mass. Gen. Laws, 1932, Ch. 4, § 7. Also see: Colo. Stat. Ann., 1935, Ch. 159, § 2; Kan. Gen. Stat., 1935, § 77-201; Code of Iowa, 1935, § 63; Rev. Stat. Me., 1930, Ch. 1, § 6; Mason's Minn. Stat., 1927, § 10933; R.S. Mo., 1929, § 655; Pub. L. N.H. 1926, Ch. 2, § 5; Rev. Stat. N.J., 1937, § 1:1-2; R.I. Gen. L., 1923, § 408; Rev. Stat. Utah, 1933, § 88-2-12; Code of Va., 1930, § 5; P.L. Vt., 1933, § 41; Code of W.Va., 1932 (Ann.) § 33; Wis. Stat., 1937, § 370.01. And see *Owens v George*, 13 Colo. 290, 22 Pac. 768, that this section refers only to incorporated towns and hence not to townships.

³³ Mass. Gen. Laws, 1932, Ch. 4, § 7. For similar statutes, see: U.S. C.A., § 571, Ch. 15, Title 18; Code Ala., 1923, Ch. 1, § 1; Dig. Stat. Ark. (Pope) 1937, § 13258; Colo. Stat. Ann., 1935, Ch. 159, § 2; Dela. Rev. Code, 1935, Ch. 1, § 1; Ga. Code, 1933, § 102-103; Ida. Code Ann., 1932, § 70-114; Ill. Rev. Stat. (Smith-Hurd) 1935, Ch. 131, § 1; Ind. Stat. Ann. (Burns) 1926, § 247; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Rev. Stat. Me., 1930, Ch. 1, § 6; Comp. L. Mich., 1929, § 76; Mason's Minn. Stat., 1927, § 10933; Miss. Code Ann., 1930, § 1392; R.S. Mo., 1929, § 655; Pub. L. N.H., 1926, Ch. 2, § 23; Rev. Stat. N.J., 1937, § 1:1-2.4; N.M., Stat. Ann., 1929, § 139-102; N.C. Code Ann., 1931, § 3949; N.D. Comp. L., 1913, § 7311; Stat. Okla., 1931, § 44; Code of Tenn., 1932, § 14; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt., 1933, § 44; Code of Va., 1930, § 5; Code of W.Va., 1932, § 33; Wis. Stat., 1937, § 370.01; Wyo. Rev. Stat., § 112-101. See *Carraway v State* (Ark.) 219 S.W. 736; *Ausmus v Peo.*, 47 Colo. 167, 107 Pac. 204 (irrespective of statute, signing by mark is a written signature).

³⁴ Mass. Gen. L., 1932, Ch. 4, § 7. Also see: R.S. Mo., 1929, § 655; Code of Iowa, 1935, § 63; Mason's Minn. Stat., 1927, § 10933; Rev. Stat. N.J., 1937, § 1:1-2; Rev. Stat. Utah, 1933, § 88-2-12; Wis. Stat. 1937, § 370.01.

Sunday or a legal holiday, the act, may, unless it is specifically authorized or required to be performed on Sunday, or on a legal holiday, be performed on the next succeeding business day.”³⁵

§ 393. Miscellaneous Statutory Rules of Construction—But Not Found in Massachusetts.—An examination of the various statutory rules of construction, reveals that the statutes of Massachusetts do not include certain statutory rules which are found in a considerable number of other states. Like the statutory provisions quoted from the laws of Massachusetts, these also, in many instances, closely resemble each other, as will be indicated in the following sections.³⁶

§ 394. The Common Law of England Adopted.—“The common law of England, so far as it is not inconsistent with the constitution, laws and institutions of this state, shall together, with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature.”³⁷

§ 395. Negro and Person of Color.—“The term ‘negro’, within the meaning of this code, includes mulatto. The term ‘mulatto’ or ‘person of color’ within the meaning of this code, is a person of mixed blood, descended on the part of the father or mother from negro ancestors, to the fifth generation.”³⁸

³⁵ Mass. Gen. L., 1932, Ch. 4, § 9. For similar provisions, see: Dig. Stat. Ark. (Pope) 1937, § 13281; Pol. Code Calif. (Deering) 1931, §§ 12, 13; Ga. Code, 1933, § 102-102; Ida. Code Ann., 1932, § 70-110; Ind. Stat. Anno. (Burns) 1926, § 903; Carroll’s Ky. Stat., 1930, § 454; Miss. Code Anno., 1930, § 1397; N.M. Stat. Ann., 1929, § 139-102; N.D. Comp. L., 1913, § 7300; Rev. Stat. Utah, 1933, § 88-2-8. Also see § 376, *infra*.

³⁶ *Infra*, §§ 355-392.

³⁷ Code of Ala., 1923, Ch. 1, § 14. For similar provisions, see: Rev. Code Ariz., 1928, Ch. 73, § 3043; Colo. Stat. Ann., 1935, Ch. 159, § 1; Ida. Code Ann., 1932, § 70-114; R.S. Mo. 1929, § 645; Purdon’s Pa. Stat., 1936, § 152; Rev. Civ. Stat. Tex., 1925, Art. 1; Rev. Stat. Utah, 1933, § 88-2-1; Code of Va., 1930, § 2; Code of W.Va. (Ann.) 1932, § 22; Comp. Stat. Wash. (Remington) 1922, § 143. See *Rains v Rains*, 97 Colo. 19, 46 Pac. (2) 740. This section seems copied from Rev. Stat. of the U.S., *Brown v Challis*, 23 Colo. 145, 46 Pac. 679; *Northern Pac. R. Co. v Hirzel*, 29 Idaho 438, 161 Pac. 854 (riparian rights). Later decisions may be considered in determining what the common law was at that time. *Johnson v U. P. Coal Co.*, 28 Utah 46, 76 Pac. 1089.

³⁸ Code of Ala., 1923, Ch. 1, § 2. Also see Code of Tenn., 1932, § 25.

§ 396. **Children and Grandchildren.**—" 'Children' and 'Grandchildren', as used in these statutes generally refer to legitimate descendants, unless there is something which shows a contrary intent on the part of the legislature." ³⁹

§ 397. **Children.**—"The term 'children' includes children by birth and adoption." ⁴⁰

§ 398. **Men.**—"The term 'men' includes boys." ⁴¹

§ 399. **Convict.**—"The word 'convict' shall mean a person confined in the penitentiary of this or any other state, or of the United States." ⁴²

§ 400. **Offense.**—"The word 'offense' includes every act or omission for which a fine, forfeiture or punishment is imposed by law." ⁴³

§ 401. **Head of a Family.**—"The phrase 'head of a family' shall include any person who has charge of children, relatives, or others living with such person." ⁴⁴

§ 402. **Chattels.**—"The term 'chattels' includes goods and chattels." ⁴⁵

§ 403. **Property.**—"The word 'property' includes both real and personal property." ⁴⁶

³⁹ Ga. Code, 1937, § 102-103.

⁴⁰ Stat. Okla., 1931, § 27.

⁴¹ Consol. Laws N.Y. (Cahill) 1930, § 23:29.

⁴² Code of W.Va. (Anno.) 1932, § 33.

⁴³ Code of W.Va. (Anno.) 1932, § 33.

⁴⁴ Kan. Gen. Stat., 1935, § 77-201.

⁴⁵ Consol. Laws N.Y. (Cahill) 1930, § 23:15.

⁴⁶ Pol. Code Calif. (Deering) 1931, § 17. Also see: Dig. Ark. Stat. (Pope) 1937, § 13263; Ida. Code Ann., 1932, § 70-114; Ind. Stat. Ann. (Burns) 1926, § 900; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; R.S. Mo. 1929, § 655; Rev. Stat. N.J., 1937, § 1:1-2; Consol. Laws, N.Y. (Cahill) 1930, § 23:38; N.C. Code, 1931 (Anno.) § 3949; N.D. Comp. L., 1913, § 7309; Okla. Stat., 1931, § 26; Code of Laws, S.C., 1932, § 899; Code of Tenn., 1932, § 15; Rev. Stat. Utah, 1933, § 88-2-12; Code of W.Va., 1932 (Anno.), § 33; Wis. Stat., 1937, § 370.01.

§ 404. **Personal Property.**—"The words 'personal property' includes money, goods, chattels, things in action, and evidences of debt." ⁴⁷

§ 405. **Money and Dollars.**—"The words 'money' or 'dollars' shall be construed to mean lawful money of the United States." ⁴⁸

§ 406. **Residence.**—"The term 'residence' shall be construed to mean the place adopted by a person as his place of habitation, and to which, whenever he is absent, he has the intention of returning. When a person eats at one place and sleeps at another, the place where such person sleeps shall be deemed his residence." ⁴⁹

§ 407. **Usual Place of Residence, etc.**—"The terms 'usual place of residence' and 'usual place of abode' when applied to the service of process or notice, shall be construed to mean the place usually occupied by a person. If such person have no family, or do not have his family with him, his office, or place of business, or if he has no place of business, the room or place where he usually sleeps shall be construed to be such place of residence or abode." ⁵⁰

§ 408. **Under Disability.**—"The phrase 'under legal disability' includes persons within the age of minority or of unsound mind, or imprisoned." ⁵¹

⁴⁷ Pol. Code Calif. (Deering) 1931, § 17. For similar statutes, see: Dig. Stat. Ark. (Pope) 1937, § 13262; Ida. Code Ann., 1932, § 70-114; Ind. Stat. Anno. (Burns) 1926, § 900; Code of Iowa, 1935, § 63; Kan. Gen. Stat., 1935, § 77-201; Carroll's Ky. Stat., 1930, § 458; Rev. Stat. N.J., 1937, § 1:1-2; Consol. L. N.Y. (Cahill) 1930, § 23:39; Code N.C. Anno., 1931, § 3949; N.D. Comp. L., 1913, § 7309; R.S. Mo., 1929, § 655; Okla. Stat., 1931, § 26; Code of Laws, S.C., 1932, 898; Code of Tenn., 1932, § 15; Rev. Stat. Utah, 1933, § 88-2-12; Pub. L. Vt., 1933, § 29; Code of W.Va., 1932 (Anno.) § 33; Wis. Stat. 1937, § 370.01. Deed to land held personal property. *State v. Hughes*, 80 Miss. 609, 31 So. 963.

⁴⁸ Dela. Rev. Code, 1935, Ch. 1, § 1.

⁴⁹ Kan. Gen. Stat., 1935, § 77-201. Also see R.S., Mo., 1929, § 655.

⁵⁰ Kan. Gen. Stat., 1935, § 77-201.

⁵¹ Kan. Gen. Stat., 1935, § 77-201. Also see R.S. Mo., 1929, § 655.

§ 409. **Roman Numerals and Arabic Figures.**—"The Roman numerals and Arabic figures are to be taken as a part of the English language." ⁵²

§ 410. **May.**—" 'May' ordinarily denotes permission and not command. Where the word as used in a statute concerns the public interest or affects the rights of third persons, it will be construed to mean 'must'." ⁵³

§ 411. **And, Or.**—" 'And' may be read as 'or', and 'or' read as 'and', if the sense requires it." ⁵⁴

§ 412. **Heretofore and Hereafter.**—"Whenever the term 'heretofore' occurs in any statute, it shall be construed to mean any time previous to the day when such statute shall take effect; and whenever the term 'hereafter' occurs, it shall be construed to mean the time after the statute containing such term shall take effect." ⁵⁵

§ 413. **Week.**—"The word 'week' shall be construed to mean seven days." ⁵⁶

§ 414. **Calendar Day.**—"A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day." ^{56a}

§ 415. **Computation of Time.**—"The time in which any act provided by law is to be done is computed by excluding the first

⁵² Kan. Gen. Stat., 1935, § 77-201. Also see Code of Iowa, 1935, § 63; Code of Tenn., 1932, § 17.

⁵³ Ga. Code, 1933, § 102-103.

⁵⁴ Code of Ohio (Baldwin) 1931, § 10213.

⁵⁵ R.S. Mo., 1929, § 649. Also see Consol. Laws N.Y. (Cahill) 1930, § 23:10.

⁵⁶ Wis. Stat., 1937, § 370.01.

^{56a} Consol. Laws, N.Y., 1930 (Cahill), § 23:19.

day, and including the last, unless the last is a holiday, and then it is excluded.”⁵⁷

§ 416. Months Before or After a Certain Day—Computation of.—“A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.”⁵⁸

§ 417. Statutes in Derogation of Common Law.—“The rule of the common law that statutes in derogation of the common law are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.”⁵⁹

⁵⁷ *Ida. Code Ann.*, 1932, § 70-109. For similar provisions, see: *Rev. Code Ariz.*, 1928, § 3039; *Ill. Rev. Stat. (Smith-Hurd)* 1935, Ch. 131, § 1; *Carroll's Ky. Stat.*, 1930, § 453; *Mason's Minn. Stat.*, 1927, § 10933; *R.S. Mo.*, 1929, § 655; *Pub. L. N.H.*, 1926, Ch. 2, § 34; *Consol. Laws N.Y. (Cahill)* 1930, § 23-20; *Code of Ohio (Baldwin)* 1930, § 10216; *R.I. Gen. L.*, 1923, § 412; *Comp. L. S.D.*, 1929, § 10665; *Code of Tenn.*, 1932, § 11; *Rev. Stat. Utah*, 1933, § 88-2-7; *Pub. L. Vt.*, 1933, § 39; *Code of Va.*, 1930, § 5; *Code W.Va. (Anno.)* 1932, § 26; *Wis. Stat.*, 1937, § 370.01; *Comp. Stat. Wash. (Remington)* 1923, § 150. Also see § 392, *supra*. And note *Hogg v Christenson*, 29 N.D. 8, 149 N.W. 562; *Fuller v Ferrin*, 51 *Utah* 105, 168 *Pac.* 1179. An intermediate Sunday is not excluded. *Svea Ins. Co. v McFarlan*, 7 *Ariz.* 131, 60 *Pac.* 936; *C. M. & St. P. Ry. Co. v Nield*, 16 *S.D.* 370, 92 *N.W.* 1069. In computing time for serving summons, day on which service was made is excluded. *Soderman v Peterson*, 36 *Idaho* 414, 211 *Pac.* 448. Notice of appeal filed on 91st day held good where the last day fell on Sunday. *Myers v Harvey*, 39 *Idaho* 724, 229 *Pac.* 1112. For meaning of “by” as fixing time for performance of an act, see 12 *A.L.R.* 1168 and 21 *A.L.R.* 1543.

⁵⁸ *Consol. Laws, N.Y. (Cahill)* 1930, § 23:30.

⁵⁹ *Code of Iowa*, 1935, § 64. Also see: *Stat. Ark. (Pope) Digest*, 1937, § 13277; *Ida. Code Ann.*, 1932, § 70-102; *N.D. Comp. L.*, 1913, § 7312; *Code of Ohio (Baldwin)* 1930, § 10214; *Stat. Okla.*, 1931, §§ 2 and 3; *Comp. L. S.D.*, 1929, § 10656; *Rev. Civ. Stat. Tex.*, 1925, Art. 10; *Rev. Stat. Utah*, 1933, § 88-2-2. See *State v Grace*, 98 *Ark.* 505. This section changes the common law rule, *McQueen v Moscow*, 28 *Ida.* 146, 152 *Pac.* 799, and is mandatory. *Hammond v Wall*, 51 *Utah* 464, 171 *Pac.* 148.

§ 418. **Penal Statutes.**—"The rule of the common law that penal statutes are to be strictly construed, has no application to this code. All its provisions and all penal statutes are to be construed according to the fair import of their terms, with a view to effect the objects and promote justice." ⁶⁰

§ 419. **General and Special Provisions.**—"In the construction of a statute the intention of the legislature—is to be pursued if possible; and when a general and a particular provision are inconsistent, the latter is paramount to the former. So a particular intent shall control one that is inconsistent with it." ⁶¹

§ 420. **Punishment.**—"In all penal statutes of the state where by the terms of such statute a definite punishment of imprisonment in the penitentiary is prescribed, the time of such imprisonment shall be construed to be the maximum of imprisonment, unless such statutes expressly provide that such time is the minimum." ⁶²

§ 421. **Retroactive Operation—Generally.**—"No statute is retroactive unless expressly so declared therein." ⁶³

§ 422. **Retroactive Operation—Offenses, Indictments, Penalties, etc.**—"All offenses committed and all penalties or forfeitures incurred prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made." ⁶⁴

§ 423. **Retroactive Operation—Contracts and Procedure.**—"Laws prescribe only for the future; they cannot impair the obligation of contracts, nor, usually have a retrospective operation. Laws looking only to the remedy or mode of trial may apply to contracts, right and offenses entered into or accrued or committed prior to their passage; but in every case a reasonable time subsequent to

⁶⁰ Comp. L. S.D., 1929, § 3577.

⁶¹ Ore. Code Ann., 1930, § 9-215.

⁶² N.M. Stat. Ann., 1929, § 139-103.

⁶³ Rev. Code Ariz., 1928, Ch. 73, § 3038. Also see Comp. L. S.D., 1929, § 10666.

⁶⁴ Ida. Code Ann., 1932, § 70-118. Also see Rev. Code Mont., 1935, § 97; Nev. Comp. Laws, 1929 (Hillyer) § 112-65; Rev. Stat. N.J., 1937, § 1:1-15. And note § 372, supra.

the passage of the statute should be allowed for the citizen to enforce his contract, or protect his right. No bill of attainder or ex post facto law shall be passed.”⁶⁵

§ 424. **Intent of the Legislature.**—“In all interpretations, the court shall look diligently for the intention of the legislature, keeping in view at all times the old law, the evil and the remedy.”⁶⁶

§ 425. **Reason and Spirit of the Law.**—“The universal and most effective way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.”⁶⁷

§ 426. **Context.**—“Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning.”⁶⁸

§ 427. **Statutes in Pari Materia.**—“Laws in *pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.”⁶⁹

§ 428. **Natural Rights.**—“Where a statute is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former controls.”⁷⁰

§ 429. **Section Headings and Headlines.**—“The sectional headings or headlines of the several sections of this code printed in black-faced type are intended as mere catchwords to indicate the contents of the section, and shall not be deemed or taken to be titles of such sections, or as any part of the statute, and, unless expressly so pro-

⁶⁵ Ga. Code, 1933, § 102-104.

⁶⁶ Ga. Code, 1933, § 102-102.

⁶⁷ Dart La. Civ. Code Ann., 1932, § 18.

⁶⁸ Dart La. Civ. Code Ann., 1932, § 16.

⁶⁹ Dart La. Civ. Code Ann., 1932, § 17.

⁷⁰ Ore. Code Ann., 1930, § 9-222. And see *Spencer v Portland*, 114 Ore. 381, 235 Pac. 279.

vided, they shall not be so deemed when any of such sections, including the headlines, are amended or re-enacted.”⁷¹

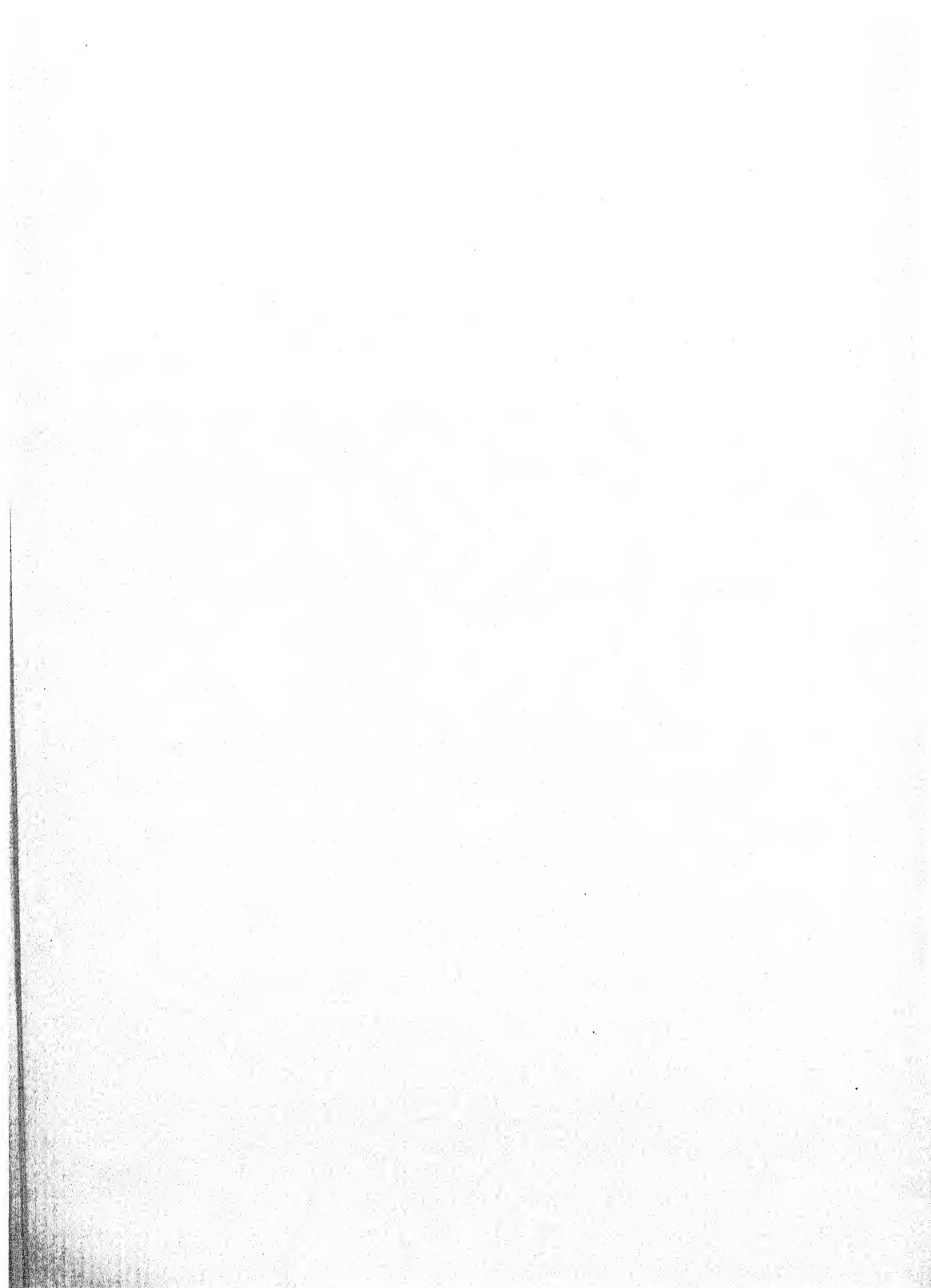
§ 430. Grammatical Errors.—“Grammatical errors shall not vitiate a law, and a transposition of words, and clauses, may be resorted to when the sentence or clause is without meaning as it stands. In no case shall the punctuation of a law control or affect the intention of the legislature in the enactment thereof.”⁷²

§ 431. Strict Construction of Statutes Enjoining or Directing Acts.—“In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect.”⁷³

⁷¹ Code of W.Va., 1932 (Ann.), § 33. Also see *Jordan v So. Boston*, 138 Va. 838, 122 S.E. 265.

⁷² Rev. Civ. Stat. Tex., 1925, Art. 11.

⁷³ Purdon's Pa. Stat., 1936, §§ 156 and 3712.



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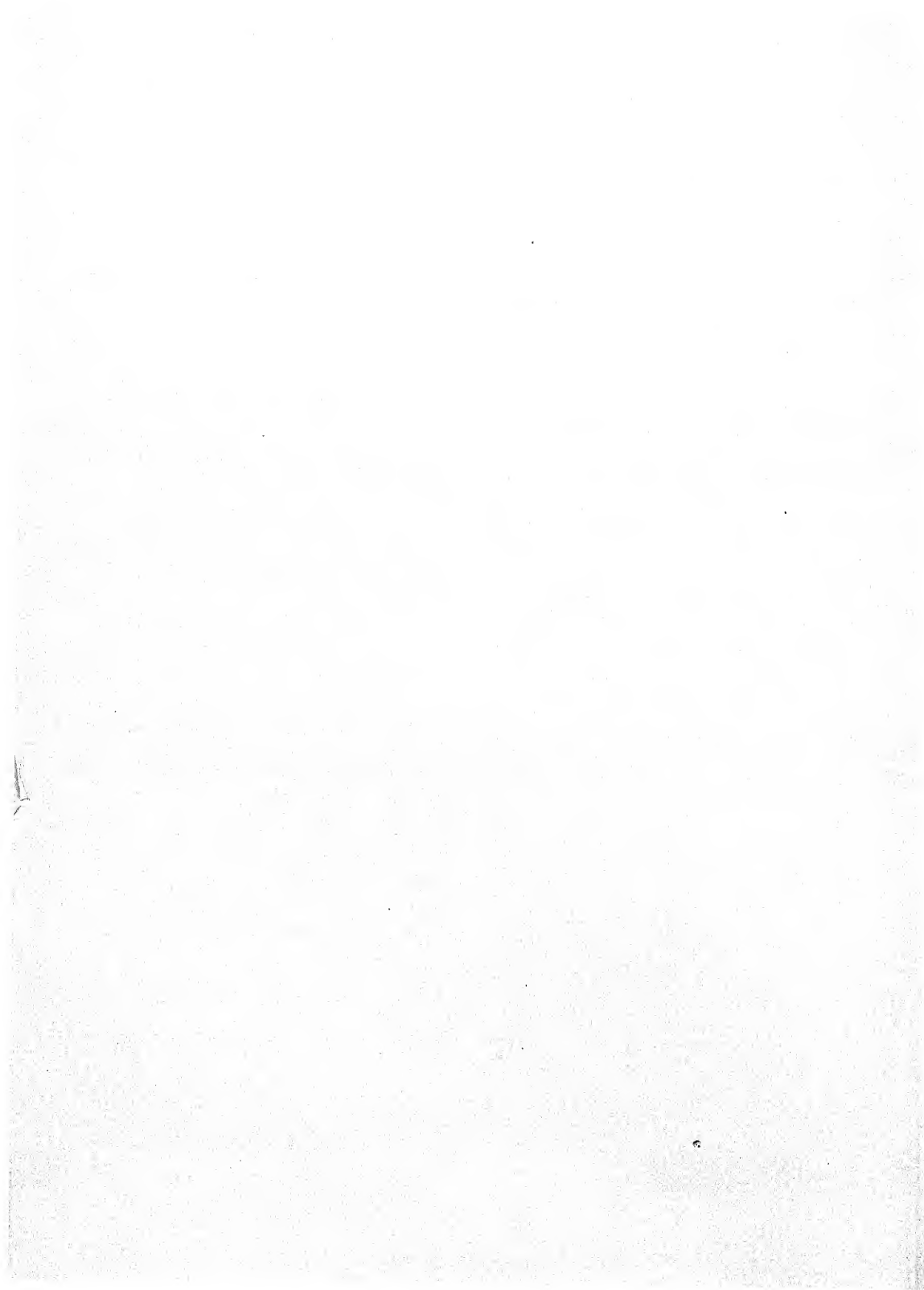
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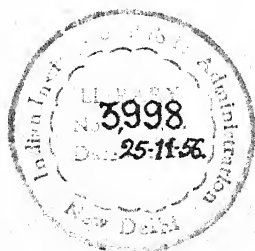
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